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The Development of Foreign Extradition Takes a Wrong Turn in Light of the Fugitive Disentitlement Doctrine: Ninth Circuit Vacates the Requirement of Probable Cause for a Provisional Arrest in Parretti v. United States

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THE DEVELOPMENT OF FOREIGN EXTRADITION TAKES A WRONG TURN IN LIGHT OF THE FUGITIVE DISENTITLEMENT DOCTRINE: NINTH CIRCUIT VACATES THE REQUIREMENT OF PROBABLE CAUSE FOR A PROVISIONAL ARREST IN *PARRETTI V. UNITED STATES*[1]

INTRODUCTION

Did you know that it is possible for an American citizen to be arrested within the United States based on a warrant without a showing of probable cause? Did you know that it is also possible for an American citizen to be held in prison for a limitless period of time without bail? In 1986, Robert Henry Russell, a citizen of the United States, was arrested because the Colombian government charged him with fraud.[2] A United States Attorney of the Southern District of Texas, acting on behalf of the Colombian government, filed a complaint that alleged he had information and belief that Mr. Russell had violated certain sections of the Colombian penal code.[3] A United States Magistrate issued a warrant for Mr. Russell's provisional arrest based upon the information contained in the complaint.[4] Mr. Russell remained in custody for two months before his claims were finally addressed by the court for the first time.[5] Mr. Russell subsequently claimed that the court erred in denying his request for bail and in granting his provisional arrest without a showing of probable cause.[6]

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1. The United States Court of Appeals for the Ninth Circuit heard arguments for *Parretti v. United States* on November 21, 1995. *See* 112 F.3d 1363, 1363 (9th Cir. 1997). The case was decided on May 6, 1997. *See id.* The Ninth Circuit then amended its opinion on August 29, 1997. *See* 122 F.3d 758 (9th Cir. 1997). The facts recited in the amended version will be relied upon throughout this Note. On December 18, 1997, the Ninth Circuit sitting en banc heard arguments. *See* 143 F.3d 508, 508 (9th Cir. 1998) (en banc). The en banc panel issued its decision on May 1, 1998. *See id.* The en banc opinion will also be discussed throughout this Note.

2. *See* In the Matter of Extradition of Robert Henry Russell, 647 F. Supp. 1044, 1045 (U.S.S.D. Tex. 1986).

3. *See id.* at 1045.

4. *See id.*

5. *See id.*

6. *See id.* at 1046.

International extradition enables a government to request the return of a United States citizen who has committed a crime within its borders but has fled to another country.[7] Extradition also allows a government to provisionally arrest an American before a formal extradition hearing occurs.[8] The provisional arrest results in the detention of an American for a specified period of time while the requesting government gathers information for a formal hearing.[9] Unfortunately, the provisional arrest warrant can be obtained without a showing of probable cause, contrary to the requirements of the Fourth Amendment to the United States Constitution.[10] As a result, Americans can be detained in prison while they await a formal extradition hearing without the protections that are normally afforded to them.

The United States government justifies this type of detention with two reasons. First, it argues that the ability to enforce and maintain an extradition treaty with a foreign country depends upon the ability to capture a defendant who is a flight risk.[11] According to the government, this is more important than the legal provisions that are expected to protect the interests and rights of its own citizens.[12] Second, the government contends that a showing of probable cause for a provisional arrest is statutorily required.[13] However, the relevant statute, 18 U.S.C. § 3184, has been interpreted to require probable cause only for a formal extradition hearing.[14] Therefore, a showing of probable cause is not required for a provisional arrest warrant unless it is specifically mandated by the language of the applicable treaty.

The judiciary has, on occasion, interpreted the language of various extradition treaties to require probable cause for the issuance of a provisional arrest warrant.[15] Usually, the legislature simply revises the treaty to exclude any language that may indicate a requirement for

7. *See* Parretti v. United States, 122 F.3d 758, 785 (9th Cir. 1997) (Rienhardt, J., concurring).

8. *See id.* at 785 n.5 (citing United States v. Kirby, 106 F.3d 855 (9th Cir. 1996)).

9. *See id.*

10. U.S. CONST. amend. IV ("[N]o [search] Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

11. *See Parretti*, 122 F.3d at 771-73.

12. *See id.*

13. *See id.* at 772.

14. *See* M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 686 (3d ed. 1996) [hereinafter BASSIOUNI, INTERNATIONAL EXTRADITION].

15. *See, e.g.*, Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988) (interpreting extradition treaty between the United States and Spain); United States v. Russell, 805 F.2d 1215 (5th Cir. 1986) (interpreting extradition treaty between the United States and the Republic of Columbia); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) (interpreting extradition treaty between the United States and Italy).

probable cause.[16] Thus, the judiciary's proactive interpretation of an extradition treaty fails to rectify the situation because there remains no bright line rule as to what is required for a provisional arrest. As a result, neither the applicable extradition treaty nor § 3184 ensures that probable cause will be required for a provisional arrest.

Parretti v. United States represents the first time that a court addressed the issue of a provisional arrest in light of the Fourth Amendment. In *Parretti*, the Ninth Circuit held that the Fourth Amendment required a showing of probable cause for a provisional arrest warrant.[17] It also held that a denial of bail absent a risk of flight violated the Fifth Amendment because no person shall be deprived of life, liberty, or property without due process of law.[18] However, one year later the Ninth Circuit sitting en banc vacated these holdings and dismissed Parretti's appeal.[19]

Under the Fugitive Disentitlement Doctrine, which allows the judiciary to dismiss the appeal of a defendant when he or she becomes a fugitive, the Ninth Circuit vacated its holding.[20] The court acted without discretion and lost sight of the importance of the constitutional issues involved. As a result, the law of extradition remains unsettled as to whether the Fourth Amendment applies to a provisional arrest, and thereby fails to protect a United States citizen from the burden of detention without a showing of probable cause. As mentioned, neither treaty language nor § 3184 provides the requirement of probable cause for a provisional arrest warrant. Thus, citizens may be subjected to arrest without the protection that is afforded by the United States Constitution.

Part I of this Note provides a general background of the development and purpose of extradition law.[21] It also offers a description of and rationale for the Fugitive Disentitlement Doctrine and shows how courts have applied the doctrine.[22] Next, Part I presents the purpose and effects of a provisional arrest.[23] Finally, it discusses the ramifications of the special circumstances doctrine in light of the issue of

16. *See Caltagirone*, 629 F.2d at 744. *See generally* Treaty on Extradition, Sept. 24, 1984, U.S.-Italy, art. XIII, T.I.A.S. No. 10,837.

17. *See* 122 F.3d at 773.

18. *See id.* at 781; *see also* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

19. *See* Parretti v. United States, 143 F.3d 508, 511 (9th Cir. 1998) (en banc).

20. *See id.* at 511.

21. *See infra* notes 31-72 and accompanying text.

22. *See infra* notes 73-104 and accompanying text.

23. *See infra* notes 105-190 and accompanying text.

bail.[24] Part II discusses in detail the facts and procedural history of the 1998 en banc decision in *Parretti v. United States*.[25] It also describes the rationale of the majority and dissenting opinions.[26] Part III critically analyzes this decision in light of the Fugitive Disentitlement Doctrine.[27] Part III argues that the Ninth Circuit made a significant policy mistake by applying the Fugitive Disentitlement Doctrine and vacating its 1997 panel opinion.[28] Finally, Part IV addresses the impact of the en banc opinion.[29] More specifically, Part IV discusses the ramifications of leaving the constitutional issues of probable cause and bail in the context of extradition law unresolved. Part IV also explores the future impact of extradition law upon the lives of United States citizens. Part V concludes that the lack of guidance in the area of extradition will create further injustices.[30]

I. BACKGROUND

A. *International Extradition: Development and Purpose*

International extradition is a process that enables independent sovereigns to provide assistance to one other in criminal matters.[31] Usually, a state may render assistance to another state by surrendering "a person sought as an accused criminal or fugitive offender."[32] However, extradition was not always used for the surrender of common criminals. In fact, the evolution of extradition can be traced through four periods.[33] During each period, the type of criminal subject to extradition changed in order to meet the demands of the requesting state.

Initially, states used extradition as a tool to obtain the control of escaped political or religious figures.[34] Then, in the late eighteenth century, the scope of extradition shifted to capture military offend-

24. *See infra* notes 191-226 and accompanying text.
25. *See infra* notes 227-270 and accompanying text.
26. *See infra* notes 271-303 and accompanying text.
27. *See infra* notes 309-367 and accompanying text.
28. *See infra* notes 368-398 and accompanying text.
29. *See infra* notes 399-406 and accompanying text.
30. *See infra* Part V.
31. *See* GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 17 (1991).
32. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 1.
33. *See id.* at 3. From ancient times to the seventeenth century the concern for political and religious offenders dominated extradition. *See id.* The focus shifted from the eighteenth century to the mid-nineteenth century, when treaty-making was mainly concerned with military offenders. *See id.* Then, from 1833 to 1948 there was a general interest in the prevention of common criminality. *See id.* Finally, from 1948 to the present the concentration has been on international due process and human rights. *See id.* at 3-4.
34. *See id.* at 3.

ers.[35] Now extradition has expanded to meet the demands of modern travel. Due to the ease of travel, most criminals possess the ability to flee the location of their crimes.[36] As a result, states have entered into agreements of "international co-operation"[37] in order to prevent all types of criminals from obtaining refuge in foreign lands.

The purpose of extradition is not to determine the guilt or innocence of an accused.[38] Rather, extradition requires a requested state to determine the answers to two independent questions. First, the requested state must determine if there is a reasonable cause to believe that a defendant has committed the crime of which he or she is accused.[39] Second, the requested state must be convinced that the accused should be extradited from its jurisdiction in order to stand trial in the requesting state.[40] However, before the process of extradition can begin, the United States must have a duty to extradite at the request of another state. This duty is established through an international treaty between the United States and the requesting state.[41]

1. International Extradition: United States Treaty Development

The United States government is based on a system of checks and balances.[42] The Framers of the Constitution vested the Executive, Legislative, and Judicial branches of government with different responsibilities in an effort to balance their power.[43] The United States also adheres to these principles of government in the international extradition process. Each level of the federal government has the ability to review the actions of its counterparts in every phase of the extradition process.[44]

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35. *See id.*

36. *See id.*

37. GILBERT, *supra* note 31, at 17.

38. *See id.* at 6.

39. *See Ex Parte* Sternaman, 77 F. 595, 596-97 (N.D.NY. 1896); *see also* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 1-2 ("The surrender of a person who has been granted the privilege of presence or refuge in the requested state has always been deemed an exceptional measure running against the traditions of asylum and the hospitality of the requesting state.").

40. *See Sternaman*, 77 F. at 596-97.

41. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 50-51.

42. *See* U.S. CONST. arts. I, II, III. Article I says, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Article II states, "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. Article III reads, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

43. *See* U.S. CONST. arts. I, II, III.

44. *See* U.S. CONST. art. II, § 2.

In the United States, an applicable treaty is required to establish a duty to extradite internationally.[45] According to the Constitution, the power to develop and enter into a treaty with another sovereign rests solely with the Executive branch.[46] Congress then provides a twofold review process of that treaty. First, the House of Representatives may enact legislation to limit the scope of the treaty.[47] Second, the Senate, through its power of advice and consent, may approve the treaty "provided two-thirds of the Senators present concur."[48] The judiciary, however, "cannot enjoin, prohibit or mandate" the Executive branch from negotiating a treaty or refusing to extradite an accused.[49] These limitations are compensated by the judiciary's power to deny the extradition of an accused "if the extradition is in violation of the Constitution, U.S. Laws, or the applicable treaty."[50]

2. *Bilateral Treaties: The Inherent Difficulties*

The use and enforcement of bilateral treaties in the international extradition process has been the policy of the United States since the beginning of the twentieth century.[51] "Bilateral treaties make for a piecemeal approach to extradition practice, given that some differences will arise during each set of negotiations, but the agreement will be best suited to the two parties' particular situation."[52] A bilateral treaty may be analyzed in "contractual terms"[53] because the treaty is required to bind the respective countries in mutual extradition. One of the effects of a bilateral treaty is its tendency to promote the idea of

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45. *See* Valentine v. United States, 299 U.S. 5, 6-11 (1936) (requiring that the United States only extradite those within its territory if pursuant to a treaty between the United States and the requesting State); Factor v. Laubenheimer, 290 U.S. 276, 287 (1933) (same); United States v. Rauscher, 119 U.S. 407, 411-20 (1886) (same). 18 U.S.C. § 3184 states:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government . . . , any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States . . . may, upon complaint made under oath, charging any person found within his jurisdiction . . . issue his warrant for the apprehension of the person so charged . . . .

18 U.S.C. § 3184 (1988).

46. *See* U.S. CONST. art. II, § 2.

47. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 33.

48. U.S. CONST. art. II, § 2.

49. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 34.

50. *Id.*

51. *See id.* at 50 (citing WHITEMAN DIGEST 732-37; RESTATEMENT (THIRD) § 476; *International Procedures for the Apprehension and Rendition of Fugitive Offenders*, 1980 PROC. AM. SOC'Y INT'L L. 277); *see also* GILBERT, *supra* note 31, at 17 ("Extradition is usually effected by way of bilateral treaties, most of which, unfortunately were concluded around the turn of the century.").

52. GILBERT, *supra* note 31, at 20.

53. *Id.* at 8.

reciprocity.[54] For example, a requested State often agrees to extradite the accused based on its belief that at some point in time its own request will also be honored.

Due to the reliance upon bilateral treaties, conflicts have arisen between the law of the United States and treaty provisions. As a result, the judiciary must review extradition on a case-by-case basis to resolve the discrepancies between the Constitution, other United States laws, and the applicable treaty. According to M. Cherif Bassiouni, a scholar of international extradition:

> The problem with this approach is that it does not provide for uniformity and consistency in the extradition law and practice of the United States. In addition, it creates different jurisprudence for different treaties, thus creating a disparity in the law and practice of extradition depending upon which treaty is applicable at the time and also depending upon how different circuits will interpret certain requirements for extradition. This situation makes it more difficult to ascertain the precedental value of decisions interpreting a given treaty with respect to other treaties.[55]

As a result, international extradition lacks the uniformity enjoyed in domestic extradition. For example, during domestic interstate extradition, the Constitution requires courts to give full faith and credit to the judicial process of the requesting state.[56] This requirement is based on the belief that the judicial proceedings of every domestic state comply with elements of the Constitution.[57] Therefore, the judiciary is able to develop reliable precedent for all fifty states to follow during domestic interstate extradition. However, in matters of international extradition, the Executive branch creates treaties with foreign countries that are separate and distinct from each other.[58] Furthermore, each treaty possesses its own provisions and rules that must be interpreted by the judiciary in light of the Constitution and other relevant statutes.[59] Consequently, an analysis of each treaty on

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54. *See id.* at 17. Gilbert stresses that reciprocity may not always be necessary for a bilateral treaty because some states will simply want to dispose of criminals within their borders rather than require reciprocity. *See id.*

55. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 47.

56. The Constitution states:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2.

57. *See* Michigan v. Doran, 439 U.S. 282, 290 (1978).

58. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 47.

59. *See id.*

a case-by-case basis creates instability in extradition law and fails to develop clear precedent for all branches of government to follow.[60]

3. *International Extradition: The Reduction in Protection*

Historically, in international extradition cases, courts have failed to offer the procedural safeguards provided to criminal defendants. This has been attributed to the rationale that extradition is a process that does not determine the guilt or innocence of a fugitive. For example, in *United States v. Galanis*,[61] the court held that an extradition proceeding was not the same as a criminal prosecution.[62] More specifically, the court held that pursuant to a valid treaty, a defendant should not receive the constitutional protections offered at a criminal trial.[63]

In *Jhirad v. Ferrandina*,[64] the court held that the Sixth Amendment's guarantee of a speedy trial did not apply to international extradition.[65] According to the court, international extradition was a unique proceeding unlike a domestic criminal proceeding.[66] The court stated that orders of extradition "embody no judgment on the guilt or innocence of the accused but serve only to insure that his culpability will be determined in another and, in this instance, a foreign forum."[67] In another example, *Neely v. Henkel*,[68] the Supreme Court held that the protections of the Constitution did not apply to an American facing trial in a foreign land.[69] The Court reasoned that the Constitution did not offer protection for a crime committed in a foreign jurisdiction and under foreign laws.[70]

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60. *See* United States v. Robbins, 27 F. Cas. 825, 833 No. 16,175 (D.S.C. 1799) (noting that in the absence of any provision in the treaty in respect to which department of the government shall execute the provisions relating to extradition, the third article of the Constitution declares that the judicial power shall extend to treaties); *see also* United States v. Decker, 600 F.2d 733, 737 (1979) (stating that interpreting treaties is a judicial process).

61. 429 F. Supp. 1215 (D. Conn. 1977).

62. *See id.* at 1224.

63. *See id.*

64. 536 F.2d 478 (2d Cir. 1976).

65. *See id.* at 485 n.9.

66. *See id.*

67. *Id.* at 482. "[I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity upon which extradition is based." *Id.* at 484-85.

68. 180 U.S. 109 (1901).

69. *See id.* at 117-19.

70. *See id.*; *see also* Charlton v. Kelly, 229 U.S. 447, 460-62 (1913) (holding that there is no right to cross-examination); Messina v. United States, 728 F.2d 77, 80 (2d Cir. 1984) (confirming that there is no right to discovery in foreign extradition).

Parretti v. United States[71] represented a step in the opposite direction. Through its panel opinion, the Ninth Circuit stated that the Constitution provided for some procedural safeguards in the extradition process. It held that the Fourth Amendment requires a showing of probable cause before a provisional arrest warrant may be issued.[72] However, the Ninth Circuit abandoned this procedural safeguard afforded by the Constitution due to the Fugitive Disentitlement Doctrine.

B. The Fugitive Disentitlement Doctrine

According to *Abney v. United States*,[73] a defendant's ability to appeal a criminal conviction in a court of law is not an absolute right provided by the United States Constitution.[74] In fact, the Court held that the right to appeal is "a creature of statute."[75] However, the ability of a party to appeal an unfavorable decision should be distinguished from the procedural rules involved during the process of that appeal. Rule 47 of the Federal Rules of Appellate Procedure provides a court with the ability to establish procedural rules through adjudication, as long as those rules are not inconsistent with any other existing rule.[76]

"These rules may be implemented and enforced by the appellate courts provided that they are (1) not inconsistent with the Constitution or a statute; (2) within the authority of the courts to establish through adjudication; and (3) reasonable in light of the interests they seek to promote."[77] It is the practice of the Supreme Court to consistently "approve of a dismissal as an appropriate sanction when a prisoner becomes a fugitive during the 'ongoing appellate process.'"[78] The Fugitive Disentitlement Doctrine allows a court to dismiss an appeal of a defendant who has fled the jurisdiction of the United

71. 122 F.3d 758 (9th Cir. 1997).

72. *See id.* at 767.

73. 431 U.S. 651 (1977).

74. *See id.* at 656 (stating that there is no constitutional right to an appeal for a criminal conviction).

75. *Id. See* 28 U.S.C. § 1291 (creating the right to appeal a final decision from the district court to an appellate court in the respective jurisdiction).

76. *See* FED. R. APP. P. 47 ("[T]he courts of appeals may regulate their practice in any manner not inconsistent.").

77. Anthony Michael Altman, *The Fugitive Dismissal Rule: Ortega-Rodriguez Takes the Bite out of Flight*, 22 PEPP. L. REV. 1047, 1050 (1995). *See* Thomas v. Arn, 474 U.S. 140, 145-48 (1985).

78. Ortega-Rodriguez v. United States, 507 U.S. 234, 242 (1993).

States.[79] A court's power to dismiss a fugitive's claim is grounded in equity.[80]

1. The Various Rationales of the Doctrine

As the Fugitive Disentitlement Doctrine evolved, several courts developed distinct rationales to support its use. This evolution began in 1879 with *Smith v. United States*.[81] In *Smith*, the Court justified its use of the doctrine when it held that the convicted party must be present in court to receive the judgment of the appeal.[82] According to the Court, it had the ability "to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render."[83] As a result, the Fugitive Disentitlement Doctrine enabled a court to dismiss an appeal when a convicted party fled its jurisdiction because the court feared that it would be unable to enforce its judgment.

Almost a century later, in *Molinaro v. New Jersey*,[84] the Court justified the doctrine based on its belief that being a fugitive disentitled a party from the benefits of an appeal.[85] The Court held that "escape does not strip the case of its character as an adjuticable case or controversy, we believe it disentitles the defendant to call upon the resources of the court for determination of his claims."[86] Other rationales developed by courts for the Fugitive Disentitlement Doctrine include the encouragement of surrender, the discouragement of escape, and the promotion of the dignified operation of the courts.[87]

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79. *See id.* at 234; *see also* Estelle v. Dorrough, 420 U.S. 534, 541-42 (1975).

80. *See* United States v. Sharpe, 470 U.S. 675, 681 n.2 (1985); United States v. Van Cauwenberghe, 934 F.2d 1048, 1054 (9th Cir. 1990).

81. 94 U.S. 97 (1879).

82. *See id.* at 97.

83. *Id. See, e.g.*, Bonahan v. Nebraska, 125 U.S. 692, 692 (1887) (stating that where the accused escapes while a writ of error is pending, the case will be stricken from the docket unless he is brought within the jurisdiction of the court below on or before the last day of the term). *See also* Allen v. Georgia, 166 U.S. 138 (1897) (affirming *Smith* and *Bonahan*).

84. 396 U.S. 365 (1970).

85. *See id.*

86. *Id.* at 366. *See, e.g.*, Hussein v. INS, 817 F.2d 63 (9th Cir. 1987) (stating that the defendant was disentitled from the resources of the court when he escaped from federal custody). It should also be noted that Judge Norris' concurrence stated that there is not a per se requirement to such a dismissal. *See id.* at 63 (Norris, J., concurring).

87. *See, e.g.*, Estelle v. Dorrough, 420 U.S. 534, 537 (1975) (affirming a statute that required a defendant's appeal to be dismissed if the defendant escaped during the pending appeal because then the court would be unable to enforce its judgment).

2. *Which Jurisdiction's Dignity Should the Doctrine Protect?*

Some circuits tried to expand the use of the Fugitive Disentitlement Doctrine to encompass all stages of the appellate process.[88] However, the Supreme Court in *Ortega-Rodriguez v. United States* overruled these attempts.[89] The defendant in *Ortega-Rodriguez* fled while his sentencing was pending but was recaptured before his appeal occurred.[90] In its decision, the Court focused on the connection between the defendant's status as a fugitive and the appellate process.[91] As a result, the Supreme Court determined that the defendant did not disrespect the appellate court, but rather "flouted the authority of the district court."[92] Therefore, it was the district court that held the authority to defend its dignity and penalize the defendant.[93] The Court further stated:

> We cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings. Such a rule would sweep far too broadly. . . .[94]

Thus, the Fugitive Disentitlement Doctrine is a tool for the specific jurisdiction from which the fugitive has fled and thus disrespected to protect its dignity. It is not a tool to protect the dignity of the entire judiciary.

3. *Act of Discretion Before Applying Fugitive Disentitlement*

Recently, the enforcement of the Fugitive Disentitlement Doctrine has been highlighted by the judiciary's use of discretion. Discretion is normally based on the importance of the issue presented and the rela-

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88. *See, e.g.*, United States v. London, 723 F.2d 1538, 1539 (11th Cir. 1984) (holding that a fugitive's flight during trial was not different from his or her flight after conviction but before sentencing); United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982) ("[A] defendant who flees after conviction, but before sentencing, waives his right to appeal from the conviction unless he can establish that his absence was due to matters completely beyond his control.").

89. *See* 507 U.S. 234, 249 (1993).

90. *See id.* at 246.

91. *See id.* at 249.

92. *Id.* at 245-46.

93. *See id.*; *see also* United States v. Anagnos, 853 F.2d 1, 2 (1st Cir. 1988) (failing to apply the reasoning of *Holmes* because the defendant's "misconduct was in the district court, and should affect consequences in that court").

94. *Ortega-Rodriguez*, 507 U.S. at 246. The Court offered an example of the sweeping nature of the rule developed in *Holmes* when it stated that it would be permitted to "dismiss a petition solely because the petitioner absconded for a day during district court proceedings, or even because the petitioner once violated a condition of parole or probation." *Id.*

tionship between the defendant's escape and the appellate process.[95] For example, in *Degen v. United States*,[96] the Supreme Court overruled the application of the Fugitive Disentitlement Doctrine in order to prevent the lower court's excessive use of power.[97]

Also, there is no per se rule that an appellate court must dismiss an appeal based on escape.[98] More specifically, in *United States v. Van Cauwenberghe*,[99] the court did not solely focus upon the escape of the defendant.[100] Rather, the court employed a "totality of circumstances"[101] approach to the Fugitive Disentitlement Doctrine, under which escape was just one of the factors to be considered. Furthermore, in *United States v. Veliotis*,[102] the court added another factor that should be considered before using the Fugitive Disentitlement Doctrine.[103] The court specifically stated that "where a fugitive defendant seeks to vindicate a right vouchsafed by the United States Constitution, the court should give weight to this factor in determining how to exercise its discretion."[104]

C. *Provisional Arrest*

Throughout history, the process of extradition has enabled the government to obtain a provisional arrest warrant before a formal hearing has occurred.[105] A provisional arrest has been defined as "a temporary arrest made prior to, and in contemplation of an extradition request, pursuant to a treaty which authorizes it and for the lim-

95. *See* United States v. Sharpe, 470 U.S. 675, 681 n.2 (1985) (deciding the case on the merits rather than dismissing); Eisler v. United States, 338 U.S. 189, 194 (1949) (Murphy, J., dissenting) (concluding in the dissent that the court should exercise discretion when contemplating dismissal in light of the importance of the issue presented).

96. 517 U.S. 820 (1996).

97. *See id.* at 829. The court further stated that "the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked." *Id.* at 828. *But see* Estelle v. Dorrough, 420 U.S. 534, 544 (1975) (Stewart, J., dissenting) (stating in the dissent that punishment by appellate dismissal introduces an element of arbitrariness and irrationality into sentencing for escape).

98. *See* Katz v. United States, 920 F.2d 610, 611-12 (9th Cir. 1990); Hussien v. INS, 817 F.2d 63, 63 (9th Cir. 1986).

99. 934 F.2d 1048 (9th Cir. 1990).

100. *See id.* at 1054.

101. *Id.*

102. 586 F. Supp. 1512 (S.D.N.Y. 1984).

103. *See id.* at 1514.

104. *Id.* at 1515. *See, e.g.*, United States v. Tunnell, 650 F.2d 1124, 1126 (9th Cir. 1981) (holding that a dismissal of an appeal where a conviction may have been based on an unconstitutional presumption was unjustified); United States v. Tapia-Lopez, 521 F.2d 582, 583 (9th Cir. 1975) (holding that the defendant's failure to object to a jury instruction before her conviction did not preclude the point for appeal).

105. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 675.

ited period of time provided for in the treaty. The arrest is made pursuant to a warrant issued by a judge or magistrate."[106] The primary purpose of a provisional arrest is to secure an individual while the requesting state gathers and transmits the necessary documents for formal extradition.[107] It is the policy of the United States to grant a provisional arrest if there is reason to believe that the individual will flee before the formal extradition process takes place.[108]

1. Two Underlying Conditions: Urgency and Probable Cause

Generally, two substantive conditions are required for a provisional arrest warrant—urgency and probable cause. Urgency is a question of fact that is contemplated by a court in light of any credible evidence.[109] It is based upon the nature of the crime charged and the personality of the accused, such as whether he or she is likely to flee the jurisdiction.[110] For example, a court is more likely to find urgency in a situation in which a suspect is accused of murder rather than a suspect charged with fraud. However, when practically applied, the element of urgency is usually ignored or satisfied by a simple allegation of the requesting state.[111]

Probable cause, a constitutional requirement of the Fourth Amendment, is "[a] reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime."[112] Before the 1997 *Parretti* panel decision, the Fourth Amendment had never been applied to a provisional arrest. Usually, when an accused claimed that his or her provisional arrest lacked a requirement of probable cause, the government would argue that 18 U.S.C. § 3184 already required probable cause for a provisional arrest.[113] Therefore, the government argued that the Fourth Amendment was not necessary to determine the issue of probable

106. *Id.*

107. *See id.* at 677; *see also* GILBERT, *supra* note 31, at 37 (quoting Government of the F.R.G. v Sotiriardis, [1975] AC 1 at 25C and G-H) ("[A] provisional warrant provides for '. . . the precautionary arrest of the fugitive criminal to prevent him from fleeing the country before the requisition for his surrender has been received by the Secretary of State.'").

108. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 677. According to Bassiouni, there are three elements to justify a provisional arrest. First, there must be "a condition of emergency or urgency or some type of exigent circumstances." *Id.* Second, the provisional arrest warrant must be based "basically [on] the same substantial ground as would authorize the issuance of a warrant by a United States court for the crime charged." *Id.* Third, any other elements required by the applicable treaty or extradition law must be satisfied. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. BLACK'S LAW DICTIONARY 1219 (7th ed. 1999).

113. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 47.

cause. Consequently, many uncertainties have developed throughout the evolution of extradition law concerning the Fourth Amendment and its relation to relevant treaty provisions.[114]

2. *Early Determinations of Probable Cause for a Provisional Arrest*

Despite the failure to apply the Fourth Amendment, some early cases implicitly addressed the determination of probable cause for a provisional arrest. These early cases resulted in decisions that conflicted as to the amount of evidence required for a provisional arrest warrant. In 1896, the court in *Ex parte Sternaman*[115] outlined the requirements of a sufficient government complaint that would establish probable cause for a provisional arrest.[116] The court favored a less technical practice of drafting a complaint when it declared:

> The complaint should set forth clearly and briefly the offense charged. It need not be drawn with the formal precision of an indictment. If it be sufficiently explicit to inform the accused person of the precise nature of the charge against him it is sufficient. The extreme technicality with which these proceedings were formerly conducted has given place to a more liberal practice, the object being to reach a correct decision upon the main question—is there reasonable cause to believe that a crime has been committed? The complaint may, in some instances, be upon information and belief.[117]

In *Sternaman*, the requesting state's representative lacked personal knowledge about the crime in issue.[118] Despite the representative's lack of personal knowledge, the court held that the government's complaint was sufficient to authorize a provisional arrest warrant.[119] According to the court, a complaint is sufficient to warrant action if the offense is an extraditable crime defined by the treaty and the complaint "clearly and explicitly"[120] explains the nature of the crime to the defendant.[121]

Five years later, the Supreme Court in *Rice v. Ames*[122] did not endorse the full rationale of *Sternaman*.[123] The Court did support the premise that allowed a representative without personal knowledge of

114. *See* U.S. CONST. amend. IV.
115. 77 F. 595 (N.D.N.Y. 1896).
116. *See id.* at 596-97.
117. *Id.*
118. *See id.* at 597-98.
119. *See id.* at 598.
120. *Id.* at 597.
121. *See Sternaman*, 77 F. at 597.
122. 180 U.S. 371 (1901).
123. *See id.* at 374.

the crime to submit a complaint sworn on information and belief.[124] However, unlike *Sternaman*, the Court required that a complaint based upon information and belief be supplemented with other sources of evidence.[125] More specifically, the Court declared that an officer without personal knowledge

> may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress.[126]

Consequently, the Court held that certain counts of the complaint were insufficient because the foreign representative failed to identify the sources of information.[127] As a result, the Supreme Court developed a more challenging standard for a complaint requesting a provisional arrest. It declared that a complaint may be submitted when based upon information and belief, but that the court must be informed of other sources.[128] "This will afford ample authority to the commissioner for issuing the warrant."[129]

One year later, in *Grin v. Shine*,[130] the Supreme Court acknowledged that foreign countries were not completely aware of United States criminal procedure.[131] Therefore, the Court adjusted and reduced the requirements of a complaint submitted for a provisional arrest. In its opinion the Court stated:

> [W]here the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations . . . .
>
> . . . .
>
> All that is required by § 5270 is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government . . . based upon depositions in his possession.[132]

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124. *See id.* at 375.

125. *See id.*

126. *Id.* at 375-76. The court also added a disclaimer to its opinion by stating that it did not want "to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty." *Id.* at 375.

127. *See id.* at 374.

128. *See Rice*, 180 U.S. at 375.

129. *Id.* at 376.

130. 187 U.S. 181 (1902).

131. *See id.* at 184-85.

132. *Id.* at 185, 193.

The significant difference between the *Grin* and *Rice* opinions was the requirement of supplemental evidence. The Court in *Grin* did not specify whether the depositions were to be sent directly to the judge or if it was sufficient for the representative to inform the judge of their presence.[133] Despite this ambiguity, the Court nonetheless failed to recognize a standard of evidence sufficient to establish probable cause for a provisional arrest.[134] More specifically, the holding in *Grin* required less evidence than that required by *Rice*.

Once again in 1909, the Supreme Court reduced the requirements of a complaint that requested a provisional arrest. In *Yordi v. Nolte*,[135] the requesting representative, a Mexican authority, based his complaint solely upon information and belief.[136] He had neither personal nor actual knowledge of the defendant's offense. However, at the time the complaint was drafted, he did have witness depositions and a copy of the Mexican proceedings at his disposal.[137] The defendant claimed that the Mexican government should have either attached its record to the complaint or disclosed on the face of the complaint the sources of its information.[138] The Court, however, disagreed and held that the provisional arrest was not invalidated simply because the Mexican records and depositions were not attached to the complaint.[139] The Court stated that "it was not indispensable to the jurisdiction of the commissioner that the record and depositions from Mexico should be actually fastened to the complaint."[140] As a result, the Supreme Court came full circle and endorsed the rationale of *Sternaman*,[141] which was the least restrictive holding governing the provisional arrest.

After *Yordi*, two decisions also implicitly reduced the standard of probable cause required for a provisional arrest warrant. First, the Court in *Glucksman v. Henkel*[142] stated that "[t]he complaint is sworn to upon information and belief, but it is supported by the testimony of witnesses who are stated to have been deposed, and whom, therefore,

133. *See id.* at 185.

134. *See id.*

135. 215 U.S. 227 (1909).

136. *See id.* at 228.

137. *See id.*

138. *See id.* at 229.

139. *See id.* at 230. The Court also stated the "the general doctrine in respect of extradition complaints is well stated by Judge Coxe in Ex parte Sternaman . . . ." *Id.* It then proceeded to repeat the logic of *Sternaman*. *See* 77 F. 595, 596-97 (N.D.N.Y. 1896).

140. *Yordi*, 215 U.S. at 230.

141. 77 F. at 596-97.

142. 221 U.S. 508 (1911).

we must presume to have been sworn. That is enough."[143] Second, in *Fernandez v. Philips*,[144] the Court held that a complaint based upon the information of a foreign government and issued by the Assistant United States Attorney ("AUSA") is sufficient.[145] The Court stated that whether a complaint is sufficient does not depend upon the knowledge of the AUSA as to the sufficiency of the facts presented by the foreign government.[146]

3. *The Modern Requirements of a Provisional Arrest*

Contrary to the confusion in the late nineteenth and early twentieth centuries, the modern requirements to obtain a provisional arrest warrant are extremely relaxed. Consequently, a complaint and warrant application presented to a judge or magistrate supported by minimal information will be approved.[147] A request for a provisional arrest goes through the Department of State and usually precedes the presentation of formal documents.[148] The actual request for a provisional arrest by a foreign government should include: (1) a description of the fugitive; (2) an indication of the fugitive's exact location within the requested state; (3) an enumeration of the treaty offense charged; (4) a description of the circumstances of the crime including its date and time; (5) the date of the issuance of a warrant or conviction by the requesting government and the name of the judge and court that issued it; and (6) a description of the urgency involved in warranting a provisional arrest.[149]

A request is accompanied by an affidavit from the AUSA. Within the affidavit the AUSA swears to the following facts:

> that (1) a telex, facsimile, or actual document was received from a requesting state with which the United States has an extradition treaty; (2) that the request is for the "provisional arrest" of a named or identified person, whose presence is believed to be in the United States; (3) that the request is based on a treaty offense . . . ; (4) that an arrest warrant was issued by a competent judicial authority in the requesting state for that offense; and (5) that the requesting state intends to submit a formal extradition request in accordance with

143. *Id.* at 518. This case adds more informality to the requirements for a provisional arrest warrant because it assumes that the information presented was properly taken.

144. 268 U.S. 311 (1925).

145. *See id.* at 313.

146. *See id.*

147. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 792-93.

148. *See id.* at 792.

149. *See id.* at 793-94; *see also* UNITED STATES ATTORNEY'S MANUAL ch. 15, §§ 9-15.230 -9-15.231 (offering a sample form for requesting a provisional arrest).

> the requirements of the applicable treaty within the period of time provided for in the treaty. . . .[150]

Although such documentation is required for a provisional arrest, the courts have traditionally accepted far less.[151] Normally, the affidavit presented by the AUSA is simply based on the information received from the police interpol or a facsimile.[152] As a result, a judge or magistrate may issue an arrest warrant that is based on facsimile without any verification or presentation of sources.[153] Therefore, it becomes very difficult for a defendant to "effectively challenge the absence of probable cause."[154]

The statutory scheme of 18 U.S.C. § 3184 requires the presentation of evidence to establish probable cause at a formal extradition hearing. However, it does not require probable cause for a provisional arrest warrant. This is different than federal domestic cases where the government is required to offer evidence in order to establish probable cause before an arrest warrant will be issued.[155] Furthermore, in a domestic case, if an arrest occurs without a warrant, the judiciary requires that a probable cause hearing be held promptly after the

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150. BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 682-83.

151. The usual process for a provisional arrest can be broken down into five steps. First, "the arrest warrant must be issued by a judge or magistrate in the federal district where the person sought is believed to be located; or, by the Federal District Court for the District of Columbia" if that person's location within the United States is unknown. *Id.* at 681. Second, the warrant's legality rests within a treaty provision that specifically authorizes it. *See id.* Third, the warrant is only valid for the specific period of time that is authorized in the treaty. *See id.* at 681. Fourth, "[t]he issuance of a warrant must be pursuant to a requesting state's submission to the United States Government that it wants a given person detained pending preparation and/or presentation of a formal extradition request pursuant to a valid treaty between the requesting state and the United States." *Id.* at 681-82. Fifth, probable cause should exist. *See id.* at 682.

152. *See id.* at 683.

153. *See id.*

154. *Id.* Moreover, there is no way to challenge the validity of the arrest warrant except on constitutional grounds. *See id.* The establishment of probable cause typically occurs as follows:

> [t]he principal supporting document that the Government will present in such cases is a telex or a facsimile from the national Interpol office of the requesting state. That Interpol communication usually contains only scant information about the fact that an arrest warrant is outstanding and that the person named is sought by the judicial or police authority in the requesting state. . . . Interpol merely communicates these warrants through its liaison office which consists of national police officers assigned to work in that capacity.

Id. at 683 (citing Mary Jo Grotenroth, *Interpol's Role in International Law Enforcement, in* LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 375, 376 (M. Cherif Bassiouni ed., 1988)).

155. *See* Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (holding that a magistrate or judge may issue a warrant if probable cause is established through the totality of the circumstances).

arrest.[156] In contrast, when governments negotiate extradition treaties they provide for longer periods of provisional arrest, usually between forty and sixty days.[157] During negotiations it is believed that the length of the provisional arrest is justified because government agencies and the judiciary are overworked and understaffed.[158] As a result, countries arrange for longer periods of detention during the provisional arrest in order to ease the burden of these agencies.[159] This reduces the government's burden of establishing probable cause in extradition cases because a country may request a provisional arrest and provide evidence three months later at the formal extradition hearing.[160] Consequently, a defendant is held in prison without a determination of the validity of his provisional arrest warrant.[161] Usually, when evidence is presented to establish probable cause at a formal extradition hearing, the government contends that it is a moot issue to rectify the lack of probable cause in the provisional arrest.[162]

4. Treaties May Require Probable Cause for the Provisional Arrest

More recently, courts have become critical of the lack of probable cause required for a provisional arrest warrant. The Second, Fifth, and Seventh Circuits have recognized that the probable cause established during a formal extradition hearing does not revert back to a provisional arrest.[163] These courts have held that a formal hearing subsequently establishing probable cause does not render moot the issue of the lack of probable cause upon the defendant's initial detention.[164] Instead, each circuit looked to the language of the extradition treaties to determine if probable cause was required for a provisional arrest.[165] According to judicial interpretation, each treaty required

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156. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991) (holding that a prompt hearing depends upon a number of factors including judicial resources, holidays, and the amount of criminal activity). Generally, the reasonable amount of time is 48 hours. *See id.* at 56.

157. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 682 (citing Ivan Kavass & A. Sprudzs, EXTRADITION LAWS AND TREATIES: UNITED STATES (2 vols. 1979 & Supp. 1989)).

158. *See id.* at 682.

159. *See id.*

160. *See id.* at 682-88.

161. *See id.*

162. *See id.* at 684.

163. *See, e.g.*, Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988) (noting that officials obtained separate arrest warrant based on probable cause); United States v. Russell, 805 F.2d 1215 (5th Cir. 1986) (finding that evidence at the provisional arrest stage could be informal); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) (stating that further information was needed at the extradition hearing to establish probable cause separate from the arrest warrant).

164. *See Sahagian*, 864 F.2d at 513-18; *Russell*, 805 F.2d at 1217; *Caltagirone*, 629 F.2d at 749-50.

165. *See Sahagian*, 864 F.2d at 518; *Caltagirone*, 629 F.2d at 744.

probable cause for a provisional arrest.[166] Unfortunately, the courts were unable to address the applicability of the Fourth Amendment because the treaties were interpreted to require probable cause.[167]

In *Caltagirone v. Grant*, an Italian national was provisionally arrested in the United States pursuant to a treaty between the United States and Italy.[168] His provisional arrest warrant was issued without probable cause and he was detained for forty-five days.[169] On appeal, the Second Circuit held that the language of the treaty between the United States and Italy clearly required a showing of probable cause for a provisional arrest.[170] "Accordingly, the provisional arrest provisions of American treaties fall into two groups: those with the informational requirement, and those without it."[171]

The court also acknowledged the government's contention that there must be differences between the provisional arrest and the formal extradition hearing.[172] However, the court reasoned that these differences did "not lie in the requirement of probable cause."[173] Fi-

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166. *See Sahagian*, 864 F.2d at 513; *Caltagirone*, 629 F.2d at 744.

167. *See Sahagian*, 864 F.2d at 513; *Caltagirone*, 629 F.2d at 744.

168. *See* 629 F.2d at 742-43.

169. *See id.* at 743. To obtain the arrest warrant, the United States Attorney for the District of New York simply completed a complaint under oath that alleged the existence of Italian warrants. *See id.* The United States Attorney made no showing of probable cause. *See id.*

170. *See id.* at 744. The court reasoned:

> Article XIII of the Treaty provides that an application for provisional arrest must contain four elements: a description of the person sought; an indication of intent formally to request the extradition of the person; an allegation that a warrant for the person's arrest has been issued by the requesting state; and, finally, "such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed . . . in the territory of the requested party. Since the "requested party" in the instant case is the United States, the sufficiency of the information provided to support Caltagirone's arrest must necessarily be judged by American law. . . . The treaty does not contemplate a review of the validity under Italian law, of the Italian arrest warrants, but rather a simple factual determination whether a warrant has been issued. In this limited sense, deference to a foreign judicial determination is entirely proper. It is quite another matter, however, to assert that the Republic of Italy's decision to apply for provisional arrest will be taken as an unreviewable determination that the application conforms to all Treaty provisions. This is particularly true with respect to the "further information" requirement, since we cannot suppose that the drafters intended that an official of the requesting state would make a final determination of the law of the requested party. We proceed, therefore, to the application of United States standards for arrest and detention.

Id. (footnote omitted).

171. *Id.* at 746.

172. *See id.* at 747.

173. *Caltagirone*, 629 F.2d at 747. The court reasoned that the drafters of the treaty intended the actual procedures of the provisional arrest and the extradition hearing to differ without sacrificing the protection of probable cause. *See id.* As a result, the provisional arrest procedure was streamlined and not as formal. *See id.* "Article XI and Article XIII [of the treaty] both require a

nally, the court addressed whether the defendant's appeal was moot.[174] The government claimed that the new warrant granted by the district judge, pursuant to Italy's formal request for extradition under § 3184, superseded the provisional arrest warrant.[175] Despite the government's contention, the court held that a "provisional arrest warrant is capable of repetition."[176] The court stated:

> In view of the Government's persistent allegation . . . we do not doubt that it will seek his rearrest under Article XIII should the pending extradition complaint be denied. Under Article XIV of the Treaty . . . it enjoys the broad power to do so. Such rearrest would almost certainly be pursuant to the provisional procedure . . . for the provisional request could be made immediately, by diplomatic telex, without the substantial documentation required by Article XI.[177]

Similarly, in *Sahagian v. United States*,[178] the Seventh Circuit avoided the discussion of the Fourth Amendment and found that probable cause was required by the language of the treaty.[179] The defendant was an American citizen residing in Spain.[180] The United States Department of Justice requested the defendant's provisional arrest pursuant to Article XI of the treaty between Spain and the United States.[181] The court interpreted the treaty's language upon "[s]uch further information, if any" as requiring probable cause for a

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showing of probable cause, but the proceedings they contemplate are different in several crucial respects." *Id.*

174. *See id.* at 749-50.

175. *See id.* at 749.

176. *Id.* The court specifically stated: "Caltagirone's provisional arrest is so clearly 'capable of repetition, yet [evades] review,' that the controversy is alive and properly before us." *Id.* (citing Roe v. Wade, 410 U.S. 113, 125 (1973)).

177. *Id.* at 750. To summarize, the court rejected the government's claim that the appeal was moot because the formal extradition request displaces the provisional warrant. *See id.* at 749-50. The court reasoned that an appeal concerning a provisional arrest will continuously evade its review under this theory. *See id.* at 749. It is also quite feasible to believe that defendants can be subjected to a provisional arrest if the formal extradition is denied. *See id.* at 749-50; *see also* Collins v. Loisel, 262 U.S. 426, 429-31 (1923) (holding that when an extradition hearing ends in the defendant's release from custody, subsequent extradition demands are not barred).

178. 864 F.2d 509 (7th Cir. 1988).

179. *See id.* at 513.

180. *See id.* at 510.

181. *See id.* at 510-11. The defendant was charged with kidnapping his children. *See id.* at 510. The two relevant parts of the treaty between Spain and the United States provide:

> A. In case of urgency a Contracting Party may apply to the other Contracting Party for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. The application may be made . . . through the diplomatic channel . . . .
>
> B. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction or sentence against that person, and such further information, if any, as may be required by the requested Party.

provisional arrest.[182] However, the court also held that the government showed adequate evidence to establish probable cause.[183]

In *In the Matter of Extradition of Russell*,[184] the government received information through diplomatic channels that the defendant had committed violations of the Colombian penal code.[185] The complaint filed by the government included: (1) a statement that a warrant had been issued for the defendant by the Colombian court; (2) details of the crimes charged; (3) a description of the defendant; and (4) the defendant's address.[186] The Fifth Circuit held that "assuming without deciding that the Treaty requires a showing of probable cause to support a provisional arrest before an extradition hearing, we agree with the district court that the magistrate had enough evidence before him to show probable cause to detain Russell."[187] In addition to its holding, the court questioned the formality required in the presentation of evidence for a provisional arrest.[188]

Caltagirone, *Sahagian*, and *Russell* held all that appropriate language within an extradition treaty should be interpreted to require a showing of probable cause for a provisional arrest. Furthermore, they acknowledged that the issue of probable cause for a provisional arrest can be addressed through the application of the Fourth Amendment based on two conditions. First, the countries involved must not have a treaty with language that could be interpreted to require probable cause for a provisional arrest.[189] Second, the judge or magistrate overseeing that provisional arrest must grant a warrant based solely upon the foreign complaint. If these two conditions are met and the court recognizes that § 3184 does not require probable cause, then the issue may be addressed constitutionally. The 1997 panel decision of *Parretti v. United States*[190] is the only case to date that has presented this situation.

Id. at 511 n.1 (citing Treaty on Extradition, May 29, 1970, U.S.-Spain, art. XI, 22 U.S.T. 737, *as amended* Jan. 25, 1975, 29 U.S.T. 2283).

182. *Id.* at 511 n.1.

183. *See id.* at 512 n.4.

184. 647 F. Supp. 1044 (S.D. Tex. 1986).

185. *See id.* at 1050-51.

186. *See id.*

187. United States v. Russell, 805 F.2d 1215, 1217 (5th Cir. 1986).

188. *See id.*

189. *See* Sahagian v. United States, 864 F.2d 509, 511 (7th Cir. 1988); *Russell*, 805 F.2d at 1217; Caltagirone v. Grant, 629 F.2d 739, 743 (2d Cir. 1980).

190. 122 F.3d 758 (9th Cir. 1997).

D. The Special Circumstances Doctrine

Wright v. Henkel,[191] decided by the Supreme Court almost a century ago, is the governing authority on access to bail in extradition.[192] The defendant presented the Court with an application to attain bail in a foreign extradition hearing.[193] The Supreme Court took the defendant's appeal and analyzed the issue of bail.[194] Although the Court recognized that there was "no statute providing for admission to bail in cases of foreign extradition,"[195] it established a "special circumstances" doctrine to guide the lower courts in decisions concerning bail. The Court stated:

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief.[196]

In its holding, the Court acknowledged that the power to grant bail existed despite the absence of specific statutory or treaty provisions.[197] Furthermore, the Supreme Court's decision directed the lower courts to determine whether any special circumstances existed in order to help in the decision to grant or deny bail.[198] Despite its holding, the Court affirmed the denial of the defendant's petition for bail because it did not consider the possible development of pneumonia as a special circumstance to warrant bail.[199] However, aside from its holding, the Court failed to demonstrate what exactly constituted special circumstances. As a result, the issue was left for the lower courts to deter-

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191. 190 U.S. 40 (1903).

192. *See id.* at 63. The case simply mentioned the words "special circumstances" and it was the duty of the lower courts to decide within their power whether this doctrine would be developed. *See id.* Consequently, a majority of the circuits have applied the special circumstances doctrine on a case-by-case basis. *See id.*

193. *See id.* at 43. The extradition request came from England because the defendant had been accused of making fraudulent reports and statements to corporations. *See id.* at 42.

194. *See id.* at 43. "[T]he commissioner denied the application on the ground that no power existed for admitting petitioner to bail." *Id.*

195. *Id.* at 63. The Court further acknowledged:

> [S]ection 5270 of the Revised Statutes [(U. S. Comp. Stat. 1901, P. 3591)] is inconsistent with its allowance after committal, for it is there provided that if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Id. at 62.

196. *Id.* at 63.

197. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 692.

198. *See id.*

199. *See Henkel*, 190 U.S. at 43.

mine on a case-by-case basis. In addition, the Court, in contrast to domestic hearings, established a presumption against bail.[200]

The first reported case to interpret the Supreme Court's opinion was *In re Mitchell*.[201] In that case, the defendant applied for bail claiming special circumstances.[202] The Canadian government vehemently opposed the application for bail and claimed that the court did not have the authority to grant bail in extradition.[203] However, Judge Learned Hand stated that the Supreme Court in *Wright v. Henkel*[204] "distinctly affirmed" the power of the courts to grant bail.[205] Furthermore, according to the court, the Supreme Court clearly indicated "its judgment that the power should be exercised only in the most pressing circumstances, and when the requirements of justice are absolutely peremptory."[206] Therefore, the court held that the defendant's request for bail should be granted because special circumstances did exist.[207] According to Judge Hand:

> [W]hile I quite agree with the learned counsel for his Majesty's government that the right is a dangerous one, and ought to be exercised with great circumspection, it seems to me that the hardship here upon the imprisoned person is so great as to make peremptory some kind of enlargement at the present time, for the purpose only of free consultation in the conduct of the civil suit upon which his whole fortune depends.[208]

The scope of special circumstances encompassed peremptory requirements of justice.[209] Thus, the loss of the defendant's ability to consult with his attorney when his entire fortune was at stake consti-

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200. The Court stated:

> The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted.

Id. at 62.

201. 171 F. 289 (S.D.N.Y. 1909).

202. *See id.* at 289. The defendant's application "is made to enlarge him upon bail for the reason that at present he is entirely unable to consult with his counsel and prepare for the remainder of the trial, which will consume, probably, the 28th, 29th, and 30th days of June." *Id.*

203. *See id.*

204. 190 U.S. 40 (1903).

205. *See Mitchell*, 171 F. at 289.

206. *Id.*

207. *See id.* at 289-90.

208. *Id.* at 290. After agreeing with the defendant that special circumstances did exist, the court restricted its holding by stating: "Those special circumstances alone move me to allow him to bail, and his enlargement is to be limited strictly to the period of that suit. As soon as that is terminated he must be returned to the Tombs prison to await determination of . . . the extradition proceedings." *Id.*

209. *See id.*

tuted a special circumstance.[210] Although *Mitchell* granted bail to the defendant, the logic of the opinion was clearly molded within the narrow framework of *Wright v. Henkel.*

As illustrated by *Mitchell*, a lower court must determine through its discretion what claims create a special circumstance. In extradition, the defendant rather than the government carries the burden of establishing that bail should be granted.[211] As a result, each circuit has encountered a variety of claims purported to be a special circumstance in a bail hearing. Some defendants have established the existence of a special circumstance. In *United States v. Taitz*,[212] for example, the court held that the defendant was not a flight risk and that special circumstances existed.[213] Other claims have not sufficiently established a special circumstance. In *United States v. Smyth*,[214] the court held that the defendant's needs to consult with counsel, gather evidence, and interview witnesses were not special circumstances.[215]

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210. The dictum of the opinion suggested that the defendant did not seem to be flight prone: "I am also moved to this disposition from the fact that he has long known of the proposed proceedings and has made no effort to avoid them or escape." *Id.*

211. *See* Salerno v. United States, 878 F.2d 317, 318 (9th Cir. 1989); United States v. Leitner, 784 F.2d 159, 160-61 (2d Cir. 1986).

212. 130 F.R.D. 442 (S.D. Cal. 1990).

213. *See id.* at 447 (reasoning that the combination of the defendant's claims, such as poor health, the restriction on his ability to carry out his religious rituals, the availability of bail in the requesting country, and a showing that the crime might not warrant extradition, were sufficient for the special circumstances doctrine); United States v. Kirby, 106 F.3d 855, 863-66 (9th Cir. 1996) (holding that a combination of five factors constituted a special circumstance: (1) an unusual delay in the appeal process; (2) a defendant in a similar extradition situation received bail; (3) the requesting country will not credit time spent in United States custody; (4) the "Lobue Cloud" which resulted from a case stating that the extradition statute was unconstitutional; and (5) the defendants who were Catholics of Northern Ireland enjoyed sympathy from citizens of the United States); *Salerno*, 878 F.2d at 318 (noting that a serious deterioration in one's health and an unusual delay in the appeal process may be sufficient to establish a special circumstance); Hu Yau-Leung v. Soscia, 649 F.2d 914, 920 (2d Cir. 1981) (holding that a special circumstance existed when there were no suitable holding facilities for the defendant who was a juvenile); McNamara v. Henkel, 46 F.2d 84, 84 (S.D.N.Y. 1912) (holding that special circumstances existed when extradition hearing had been delayed for four years); *In re* Gannon, 27 F.2d 362, 363 (E.D. Pa. 1928) (stating that a special circumstance existed when bail was available in the requesting country).

214. 976 F.2d 1535 (9th Cir. 1992).

215. *See id.* at 1536 (stating that all of the defendant's claims have been experienced by other incarcerated individuals); *see also* United States v. Russell, 805 F.2d 1215, 1217 (5th Cir. 1986) (rejecting the defendant's arguments of special circumstances, which included that he did not have ample time with his attorney, that he was not personally involved with his attorney's investigative efforts, that his financial and emotional circumstances were extraordinary, and that he was a tolerable bail risk); United States v. Leitner, 784 F.2d 159, 161 (2d Cir. 1986) (holding that there are really no "special circumstances" unique to this appellant like those in previously decided cases); United States v. Williams, 611 F.2d 914, 915 (1st Cir. 1979) (stating that simply because the defendant's brother was released on bail was insufficient to establish special circumstances); Koskotas v. Roche, 740 F. Supp. 904, 919 (D. Mass. 1990) (rejecting the defendant's

1. *Special Circumstances Interpreted Liberally*

Within the context of the provisional arrest, the special circumstances doctrine has received a liberal interpretation.[216] In *Beaulieu v. Hartigan*, the court stated that the "granting of bail pending completion of the extradition proceedings has been the rule rather than the exception."[217] The court recognized that a judge in an extradition case should exercise a higher degree of review when considering bail because of its international character.[218] Although the holding in *Beaulieu* was overruled at the appellate level, the district court's opinion acknowledged that the special circumstances doctrine provided

> a district judge with flexibility and discretion in considering whether bail should be granted in these extradition cases. . . . [O]ne of the basic questions . . . in either situation is whether, under all the circumstances, the petitioner is likely to return to court when directed to do so. Fundamentally, it is a judgment call . . . based on the totality of the circumstances, including the extremely important consideration of this country's treaty agreements with other nations.[219]

According to *Beaulieu*, the court should focus on the idea of fundamental fairness rather than special circumstances.[220] Through a fundamental fairness analysis, the court should consider both the defendant's rights and concerns regarding the preparation of an adequate defense by his or her counsel.[221]

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claim because pending civil litigation was not imminent); United States v. Hills, 765 F. Supp. 381, 385-86 (E.D. Mich. 1991) (holding that because the defendant is not a flight risk was not enough); United States v. Tang Yee-Chun, 657 F. Supp. 1270, 1272 (S.D.N.Y. 1987) (holding that the defendant's difficulty in communicating with counsel during translation of a large number of documents and the complexity of the legal issues involved did not create a special circumstance for bail); United States v. Messina, 566 F. Supp. 740, 743 (E.D.N.Y. 1983) (rejecting the defendants' claims that they were good bail risks and that extraditability in this case was doubtful as "special circumstances" sufficient to justify granting bail).

216. *See, e.g.*, *Messina*, 566 F. Supp. at 742 (quoting a diplomatic note stating that "[i]n general it is the practice of United States courts to allow persons provisionally arrested to remain at large on bond if there is no evidence that the person is about to flee").

217. 430 F. Supp. 915, 916 (D. Mass. 1977) (citing cases in which the defendant had been granted bail).

218. *See id.* at 917.

219. *Id.* This case was overruled the following month in *Beaulieu v. Hartigan*. 554 F.2d 1 (1st Cir. 1977). The court stated that: "while bail may be granted in the sound discretion of the district court, the matter should be approached with caution and bail should be granted only upon a showing of special circumstances. Unlike the situation for domestic crimes, there is no presumption favoring bail." *Id.* at 1-2. *See In re* Russell, 805 F.2d 1215, 1216 (5th Cir. 1986) (stating that "bail should be denied in extradition proceedings absent special circumstances").

220. *See* 430 F. Supp. at 917.

221. There have been instances where a court has granted bail absent any special circumstances. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 694-95 (citing to a number of cases granting bail without special circumstances).

In 1997, the Ninth Circuit further extended the reasoning of *Beaulieu*. In *Parretti v. United States*, the court addressed whether the denial of bail prior to an extradition hearing deprived the defendant of liberty in violation of the Fifth Amendment.[222] The government contended that its interest in fulfilling its treaty obligations to other countries outweighed the personal liberty of the defendant.[223] However, the court reemphasized that "in our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[224] The court held that the defendant's detention violated the Due Process Clause of the Fifth Amendment and granted bail even though no special circumstances were found.[225] The Ninth Circuit stressed that a court should look to two factors when determining bail: (1) whether the defendant represents a flight risk; and (2) whether the defendant represents a threat to the safety of the community.[226] This holding was lost due to the Ninth Circuit's use of the Fugitive Disentitlement Doctrine.

II. SUBJECT OPINION

The foreign extradition of Giancarlo Parretti presented the judiciary with a case of first impression. *Parretti v. United States*[227] presented the Court of Appeals for the Ninth Circuit with a unique opportunity because probable cause was not required by the governing treaty for Parretti's provisional arrest.[228] The issuing magistrate approved a provisional arrest warrant based on the evidence in the complaint alone.[229] The language of the extradition treaty between France and the United States remained silent as to the issue of probable cause.[230]

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222. *See* 122 F.3d 758, 781 (9th Cir. 1997).

223. *See id.* at 780.

224. *Id.* at 781 (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

225. *See id.*

226. *See id.*; *see also* Schall v. Martin, 467 U.S. 253, 263, 268 (1984) (holding that the detention of a juvenile was valid because of the risk that he would commit a crime against the community before the return date); Jones v. United States, 463 U.S. 354, 368 (1983) (holding that the detention of a mentally ill patient was necessary to protect himself and the community from potential danger that he may cause); Carlson v. Landon, 342 U.S. 524, 542 (1952) (holding that the commitment of communists prior to deportation proceedings was valid because of the risk of danger that they represented).

227. 122 F.3d 758 (9th Cir. 1997).

228. *See id.* at 761.

229. *See id.*

230. *See* Treaty on Extradition, Jan. 6, 1909, U.S.-Fr., 22 U.S.T. 407, *as amended* Feb. 12, 1970, T.I.A.S. 7075.

A. Facts

Giancarlo Parretti, a financier who was a citizen and resident of Italy, headed Pathe Communications Corporation ("Pathe").[231] In 1990, Pathe acquired MGM-United Artists for approximately $1.3 billion.[232] This transaction led to the merger of the two corporations to form MGM-Pathe Communications Corporation.[233] However, Parretti highly leveraged the purchase of MGM-United Artist and the new corporation experienced immediate financial difficulties.[234] As a result, several lawsuits were filed in response to the leveraged transaction and the merger that followed.[235]

On October 9, 1995, Parretti left Italy and entered the United States to answer charges of perjury in a related suit filed in Delaware Superior Court, and to attend his own deposition for another suit filed in Los Angeles Superior Court.[236] The next day, France sent a diplomatic note to the United States Department of State requesting Parretti's provisional arrest "pursuant to Article IV of the Treaty of Extradition between the United States and France . . . ."[237] Acting on behalf of the French Government, the AUSA for the Central District of California presented the United States Magistrate Judge Joseph Reichmann with a "Complaint for Provisional Arrest Warrant."[238] The AUSA stated that on May 3, 1995 the French Government issued an international arrest warrant for Giancarlo Parretti.[239] The warrant alleged that Parretti had been charged "with various crimes arising from his alleged looting of the French company Europe Image Distribution (EID), one of MGM-Pathe's subsidiaries . . . ."[240]

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231. *See Parretti*, 122 F.3d at 761.

232. *See id.*

233. *See id.*

234. *See id.*

235. *See id.*

236. Parretti v. United States, 143 F.3d 508, 509-10 (9th Cir. 1998) (en banc).

237. *Id.* at 510. According to France, this was to detain Parretti until it decided whether to seek a formal extradition of Parretti for his alleged offenses. *See id.* "Article IV provides for the 'arrest and detention of a fugitive . . . on information . . . of the existence of . . . a warrant of arrest' and for the person 'provisionally arrested' to be held for up to 40 days pending a possible request that the fugitive be extradited." *Parretti*, 122 F.3d at 761. *See* Treaty on Extradition, Jan. 6, 1909, U.S.-Fr., 22 U.S.T. 407, *as amended* Feb. 12, 1970, T.I.A.S. 7075.

238. *Parretti*, 143 F.3d at 510 n.1.

239. *See id.*

240. *Parretti*, 122 F.3d at 761. "As alleged in the Complaint, the French arrest warrant charges Parretti with: (1) misuse of the assets of EID; (2) forging documents and using them; (3) embezzlement from EID by false pretenses; and (4) knowingly attesting to materially inaccurate facts, and knowingly making use of such a false attestation." *Id.* at 761 n.1.

Judge Reichmann issued the provisional arrest warrant for Parretti based solely upon the allegations of the complaint.[241] These allegations were based on the AUSA's information and belief that the French arrest warrant actually contained the various charges of Parretti's misdeeds.[242] However, the French arrest warrant itself was not physically attached to the complaint upon which Judge Reichmann based his decision.[243] The complaint also lacked affidavits and other competent evidence that the judge could use to make a sufficient finding of probable cause.[244] As a result, on October 18, 1995, while Parretti was undergoing his own deposition in Los Angeles, federal agents armed with a provisional arrest warrant entered the law offices of White & Case to arrest Parretti.[245] After Parretti's arrest, the United States government held him for thirty-three days without bail while the French government determined whether to request a formal extradition hearing.[246]

B. Procedural History

1. The District Court

At his bail hearing and during his habeas corpus petition in front of the district court, Parretti claimed that the arrest warrant violated the Fourth Amendment for two reasons.[247] First, Parretti contended that the warrant lacked probable cause because it was not based on evidence that he had actually committed the crimes charged by the French arrest warrant.[248] More specifically, Parretti claimed that the United States warrant was simply grounded on the existence of the French warrant and that this did not provide Judge Reichmann with enough information.[249] The government countered by stating that the warrant was "'supported by specific facts that are set forth in the Complaint, relaying facts that were conveyed to the United States by

241. *See id.* at 761.
242. *See id.*
243. *See id.*
244. *See id.*
245. *See id.* at 760.
246. *See Parretti*, 122 F.3d at 760, 764 n.6.
247. *See id.* at 761.
248. *See id.* Parretti stated:

> [I]f you look at the language in the Complaint, what they say, is that based on the French warrant, we are stating the following. All that they are doing is regurgitating to the court what they have obtained from the warrant from France. We don't know what the investigating magistrate based those statements on.

Id.
249. *See id.* at 762.

France.'"[250] The district court denied Parretti's argument and held that the complaint alleged sufficient facts to believe the charges of the French warrant.[251]

Second, Parretti claimed that his provisional arrest violated the Fourth Amendment because Judge Reichmann failed to make a probable cause determination.[252] According to Parretti, Judge Reichmann believed that the government's restatement of the allegations of the French arrest warrant "'was sufficient at this stage.'"[253] The government countered Parretti's argument by stating that "[a] warrant for a 'provisional arrest' in an extradition case may be issued without an evidentiary showing that the accused has committed a crime."[254] More specifically, the government suggested that it vary the standard of the Warrant Clause of the Fourth Amendment depending on whether the accused is answering charges to a foreign government or answering domestic charges.[255] The district court did not acknowledge either argument on this issue because it had held that the existence of the French warrant was sufficient for Parretti's provisional arrest.[256]

The district court also denied Parretti's application for bail despite the government's failure to characterize him as a flight risk.[257] According to the judge, the Supreme Court established the special circumstances doctrine in *Wright v. Henkel*, which stated that "bail in extradition cases is 'only granted under exceptional circumstances.'"[258] Parretti offered four possible special circumstances: (1) his probable success in defeating a formal extradition hearing; (2) his need to participate in civil litigation; (3) his deteriorating health; and (4) the failure of the French government to extradite him for five months after the warrant had been issued.[259] The district court re-

250. *Id.*

251. *See id.* The district court stated that the government had 40 days, according to the treaty, to make a clear presentation in reply to Parretti's argument that the government failed to make an evidentiary showing. *See id.*

252. *See Parretti*, 122 F.3d at 762.

253. *Id.* Despite this, Judge Riechmann admitted that "these naked allegations might not be sufficient to establish probable cause at the extradition hearing itself . . . ." *Id.*

254. *Id.*

255. *See id.* The government supported its position by arguing that the federal courts must defer to the Secretary of State who may accept a foreign warrant as establishing probable cause on its face. *See id.*

256. *See id.* at 763.

257. *See id.*

258. *Parretti*, 122 F.3d at 763 (citing Wright v. Henkle, 190 U.S. 40, 63 (1903)).

259. *See id.*

jected each as failing to establish a special circumstance.[260] After the district court denied both his habeas corpus and bail claims, Parretti filed a motion in the Ninth Circuit for an emergency review.[261]

2. *The United States Court of Appeals*

The Ninth Circuit granted Parretti's motion for emergency review and released him from prison immediately.[262] The court held in a panel opinion that Parretti's arrest violated the Fourth Amendment because "the government had failed to make the required evidentiary showing of probable cause to believe Parretti had committed an extraditable crime."[263] The court also held that in light of the district court's finding that Parretti was not a flight risk "his detention without

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260. *See id.* (reasoning that Parretti did not demonstrate special circumstances because he would be officially extradited in a formal hearing, that he was receiving sufficient medical treatment while in prison, and that he was still able to participate in his civil lawsuits while he was incarcerated).

261. *See id.* Parretti filed his motion under the United States Court of Appeals for the Ninth Circuit Rule 27-3, which outlines the procedure for pursuing emergency motions. *See id.* Rule 27-3 reads:

> If a movant certifies that to avoid irreparable harm relief is needed in less than 21 days, the motion shall be governed by the following requirements;
>
> (1) before filing the motion, the movant shall make every practicable effort to notify the Clerk and opposing counsel, and to serve the motion, at the earliest possible time.
>
> (2) the motion shall be filed with the Clerk in San Francisco, unless counsel for the movant certifies that relief is required on the day the motion is filed or the next day, and that counsel has not been dilatory in seeking it. In such case, the motion may be filed in a divisional clerk's office or, if there is no office in the district, with an individual circuit judge. Counsel must also transmit a copy of the motion, by overnight delivery, to the Clerk in San Francisco. If it appears that same day or next day relief is not necessary, or if it appears in a case not involving imminent execution of a sentence of death that counsel has been dilatory in requesting relief, the moving party will be directed to file the motion in San Francisco.
>
> (3) Any motion under this Rule shall have a cover page bearing the legend "Emergency Motion Under Circuit Rule 27-3" and the caption of the case. A certificate of counsel for the movant, entitled "Circuit Rule 27-3 Certificate," shall follow the cover page and shall contain:
>
> (i) The telephone numbers and office addresses of the attorneys for the parties;
>
> (ii) Facts showing the existence and nature of the claimed emergency; and
>
> (iii) When and how counsel for the other parties were notified and whether they have been served with the motion; or, if not notified and served, why that was not done.
>
> (4) If the relief sought in the motion was available in the district court, the motion shall state whether all grounds advanced in support thereof in this court were submitted to the district court, and, if not, why the motion should not be remanded or denied.

9TH CIR. R. 27-3.

262. *See Parretti*, 122 F.3d at 763. Giancarlo Parretti had already spent 33 days in jail before the court of appeals ordered his release. *See id.* at 764. On November 29, 1995, eight days after his release, the French government filed for and the United States government requested a formal extradition hearing for Parretti. *See id.* at 764 n.6.

263. *Id.* at 763.

bail violated the Due Process Clause of the Fifth Amendment . . . ."[264] The government appealed both of the court's independent holdings.

On May 10, 1996, Parretti attended his formal extradition hearing, and twenty-one days later the court finally held that he was extraditable.[265] After its decision, the court reconsidered the issue of bail and "the magistrate judge released Parretti on bail, with the government's stipulated consent . . . ."[266] Parretti then attended an unrelated trial in Delaware and was convicted of state charges.[267] While his bail hearing in Delaware was pending, Parretti fled that jurisdiction and returned to Italy.[268] This had no bearing on the district court's earlier finding that he was not a flight risk.[269] However, it did heavily influence the en banc decision of the Ninth Circuit a year later.[270]

C. *Majority Opinion*

After the Ninth Circuit's panel decision, the government immediately appealed. The Ninth Circuit granted the government's appeal and heard it en banc on December 18, 1997 in order to review its earlier decision concerning the two issues.[271] First, the en banc court was presented with the issue of whether the provisional arrest of Parretti pursuant to a valid treaty between France and the United States violated the Fourth Amendment.[272] Second, the court was asked to decide whether the Due Process Clause of the Fifth Amendment was violated because Parretti was detained without bail prior to his formal extradition.[273] However, the majority refused to consider the two constitutional issues because Parretti fled the United States while the appeal was pending.[274] Rather than examine these two issues, the court exercised its discretion under the Fugitive Disentitlement Doctrine in order to withdraw its panel opinion and dismiss the appeal.[275] According to the court, "[t]he Supreme Court has 'consistently and unequivocally approve[d] dismissal as an appropriate sanction when a

264. *Id.* at 763-64. The appellate court required that he surrender any passports and that he seek the approval of the district court before he left the jurisdiction of California. *See* Parretti v. United States, 143 F.3d 508, 510 (9th Cir. 1998) (en banc).

265. *See Parretti*, 122 F.3d at 764 n.6.

266. *Id.*

267. *See id.* at 776 n.22.

268. *See id.*

269. *See id.*

270. *See* Parretti v. United States, 143 F.3d 508, 511 (9th Cir. 1998) (en banc).

271. *See id.* at 508, 509.

272. *See id.* at 509.

273. *See id.*

274. *See id.*

275. *See id.*

prisoner is a fugitive during the ongoing appellate process.'"[276] The Fugitive Disentitlement Doctrine provided the Ninth Circuit with the power to dismiss the appeal because Parretti fled the United States and thus became a fugitive.[277]

The court offered four rationales to justify its dismissal under the Fugitive Disentitlement Doctrine.[278] First, the court stated that Parretti was disentitled from calling upon the resources of the court when he decided to flee the jurisdiction of the United States and return to Italy.[279] Second, the court feared that if it did consider the merits of the constitutional claims it would be unable to enforce its judgment.[280] If it upheld the district court's holding, it would be unable to secure Parretti's presence in order to enforce its judgment because he remained a fugitive.[281] Third, the court justified its use of the doctrine because it would protect the dignity of the appellate process and serve as a deterrent to future parties from fleeing the jurisdiction.[282] Fourth, the adversarial procedure of criminal litigation would be compromised when the defendant was a fugitive.[283] According to the majority, a fugitive's attorney may have little incentive to attend and represent the defendant in future proceedings.[284] As a result, the "defendant's flight threatens the effective operation of the appellate process . . . ."[285]

D. Dissent

In the sole dissent, Judge Reinhardt stated that the majority misapplied the Fugitive Disentitlement Doctrine.[286] "The purpose of the doctrine is to deny to those who have fled the court's jurisdiction any benefits of the court system."[287] However, Reinhardt stated that under the procedural facts of this case it was clear that the doctrine

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276. *Parretti*, 143 F.3d at 510 (quoting Ortega-Rodriguez v. United States, 507 U.S. 234, 242 (1993)).

277. *See id.*

278. *See id.* at 511.

279. *See id.* According to the court, "although Parretti's status as a fugitive does not 'strip the case of its character as an adjudicable case or controversy,' it does disentitle him from calling upon the resources of the court to resolve his claims." *Id.*

280. *See id.*

281. *See id.*

282. *See Parretti*, 143 F.3d at 511.

283. *See id.*

284. *See id.*

285. *Id.*

286. *See id.* at 512 (Reinhardt, J., dissenting).

287. *Id.* at 512-13.

did not serve its purpose.[288] In this case, Parretti filed an emergency appeal, which was granted, and he was thereafter released.[289] Soon afterwards France filed a request for Parretti's formal extradition and made the requisite showing of probable cause.[290] However, after its hearing the government failed to request that Parretti be returned to federal custody.[291] As a result, the state of Delaware assumed jurisdiction over Parretti.[292]

In Delaware, Parretti was tried and convicted of criminal charges.[293] While awaiting sentencing, Parretti fled Delaware and returned to Italy.[294] The Ninth Circuit released its panel decision and the government immediately requested a rehearing by the court en banc.[295] Due to these circumstances, the dissent believed that the Fugitive Disentitlement Doctrine was inapplicable because it failed to deny Parretti any benefit that he had not already obtained.[296] "The fugitive disentitlement doctrine makes sense *only* when we deny the *fugitive* some form of relief from the court, not when we frustrate our own ability to resolve critical constitutional questions."[297]

Judge Reinhardt reasoned that these constitutional issues warranted consideration.[298] He believed that the government of the United States should not have the ability to arrest a person without probable cause simply because a foreign country might request the extradition of that individual.[299] Judge Reinhardt stated that this was "at odds with one of our most basic constitutional principles—that the government cannot seize a person off the streets (or from a lawyer's office) and deny him his liberty without first showing probable cause to believe he has engaged in criminal activity."[300] Contrary to the government's claim, the belief that a foreign country has issued an arrest

288. *See Parretti*, 143 F.3d at 512. According to the dissent, "the doctrine makes sense only as a 'sanction' against the defendant." *Id.* at 513.

289. *See id.* at 512.

290. *See id.*

291. *See id.*

292. *See id.*

293. *See id.*

294. *See Parretti*, 143 F.3d at 512.

295. *See id.*

296. *See id.* at 513.

297. *Id.* The dissent also acknowledged two other points. First, in this case it was the government that sought relief, and it did not seek relief through the Fugitive Disentitlement Doctrine. *See id.* Second, Parretti's attorney maintained the adversarial process because he submitted a brief discussing the Fugitive Disentitlement Doctrine when requested by the court. *See id.* at 513 n.3.

298. *See id.* at 511.

299. *See id.*

300. *Parretti*, 143 F.3d at 511.

warrant does not satisfy the requirement of probable cause.[301] Judge Reinhardt also believed that the majority's failure to address the issue of bail would have a disturbing effect on the Ninth Circuit.[302] The case law of the Ninth Circuit would remain in disarray if it continued to rely upon the "cryptic language" of a case that is nearly a century old.[303]

III. ANALYSIS

The judiciary of the United States has been vested with certain inherent powers[304] in order to manage and protect its own proceedings and judgments.[305] Due to the possible effects of a court's inherent powers there exists a "danger of overreaching when one branch of the Government" is able to define its own authority without being checked by another.[306] However, these powers are not unconstrained because courts are bound by the Constitution of the United States, rules of procedure, and statutes.[307]

The judiciary must practice restraint when it resorts to its inherent powers and should administer those powers only as a reasonable response to its problems.[308] The decision in *Parretti v. United States* represents an example of a court that misused its inherent power. This analysis of the *Parretti* decision criticizes the Ninth Circuit's application of the Fugitive Disentitlement Doctrine as an unreasonable solution in light of the constitutional merits of the case. It will also establish that discretion was the best alternative for the court given the importance of the issues presented.

A. The Majority's Use of the Fugitive Disentitlement Doctrine

A brief review of the procedural facts of *Parretti* is required to understand the errors in the majority's application of the doctrine. After Parretti had been incarcerated for thirty-three days, a panel for the Ninth Circuit ordered his release from prison based upon the Fourth

301. *See id.*

302. *See id.* at 512.

303. *See id.*

304. Some of these powers include contempt power, disciplinary power over attorneys, dismissal for failure to prosecute, sentences for abuse of the judicial process, the ability to strike pleadings, and the ability to impose sanctions and costs. *See* Prevot v. Prevot, 59 F.3d 556, 565 (6th Cir. 1995); *see also* U.S. CONST art. III.

305. *See Prevot*, 59 F.3d at 565.

306. Degen v. United States, 517 U.S. 820, 823 (1996).

307. *See* Martha B. Stolley, *Sword or Shield: Due Process and The Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 753 (1997); *see also* Carlisle v. United States, 517 U.S. 416, 421-23 (1996).

308. *See Degen*, 517 U.S. at 824; *see also* Thomas v. Arn, 474 U.S. 140, 145-49 (1985).

and Fifth Amendments.[309] Eight days after his release, the federal government made a request for Parretti's formal extradition upon which the district court made a proper showing of probable cause.[310] However, the government failed to take Parretti back into federal custody and, as a result, the state of Delaware retained jurisdiction over him.[311]

Subsequently, the state tried and the Delaware court convicted Parretti on criminal charges, but before his sentencing he fled the jurisdiction of Delaware and returned to Italy.[312] Soon afterwards, the Ninth Circuit released its panel opinion and the government objected to the panel's resolution of the constitutional issues.[313] As a result, the government sought and was granted a rehearing en banc to review the constitutional issues of the case.[314] Based on these facts it would seem that the Fugitive Disentitlement Doctrine did not apply to the current situation.

1. The Ortega-Rodriguez Test

As mentioned in Part I, it has been recognized for over a century that an appellate court possesses the ability to dismiss the appeal of a defendant who remains a fugitive during the pendency of his or her appeal.[315] Since 1879, the Supreme Court has justified the use of this doctrine through a variety of rationales. These include a court's inability to enforce a judgment against a fugitive, the promotion of the efficient operation of the judicial process, the protection of the court's dignity, and the disentitlement of a fugitive's ability to seek relief from a court that he or she disrespected.[316] In March of 1993, the Supreme Court defined the proper scope of the Fugitive Disentitlement Doctrine in *Ortega-Rodriguez v. United States*.[317]

Based on the facts of *Ortega-Rodriguez*, the Court established a test that required the existence of "some connection" between the individual's fugitive status and the appellate process.[318] According to the

309. *See* Parretti v. United States, 143 F.3d 508, 512 (9th Cir. 1998) (en banc).

310. *See id.*

311. *See id.*

312. *See id.*

313. *See id.*

314. *See id.*

315. *See supra* notes 73-104 and accompanying text. This rule was first applied in *Smith v. United States*, 94 U.S. 97 (1876).

316. *See supra* notes 81-87 and accompanying text.

317. 507 U.S. 234, 246 (1993).

318. *Ortega-Rodriguez*, 507 U.S. at 244. On this point, the Court was unanimous because Chief Justice Rehnquist stated in his dissent "that there must be some 'connection' between escape and the appellate process." *Id.* at 252.

Court, the scope of the Fugitive Disentitlement Doctrine is limited to a court's ability to control its own proceedings.[319] Therefore, for a sufficient connection to exist, the individual's fugitive status must either affect a court's ability to carry out its own proceedings or prejudice the government as a litigant.[320] Thus, when a defendant appeals his criminal conviction while he remains a fugitive, the test of *Ortega-Rodriguez* would be satisfied because the pending proceedings would be frustrated.[321] The Supreme Court refused to expand the doctrine in a way that would allow an appellate court to dismiss an appeal if an individual exhibited disrespect for any aspect of the judicial system.[322]

Critics of the *Ortega-Rodriguez* case contend that a connection between the appellate process and the individual's fugitive status only applies in limited circumstances.[323] More specifically, they argue that the "connection" requirement is merely an alternative for a court to consider when the individual's status as a fugitive has ended.[324] This narrow interpretation is based on the fact that in *Ortega-Rodriguez*, the individual's fugitive status had ended, as he was returned to custody before his appeal.[325] Although it is true that the individual in *Ortega-Rodriguez* was no longer a fugitive when he filed his appeal, there remains no exception for the "connection" requirement.[326] In *Ortega-Rodriguez*, the Court recognized that the Fugitive Disentitlement Doctrine was a tool which allowed the judiciary to exercise control over its docket and proceedings.[327] As a result, if there is no connection which affects the court's ability to carry out the judicial process then the doctrine should be inapplicable. The reasoning of *Ortega-Rodriguez* emphasized that regardless of whether a person re-

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319. *See id.* at 244-46.

320. *See id.* For examples of the government's prejudice, see *United States v. Sudthisa-Ard*, 17 F.3d 1205, 1206 (9th Cir. 1994) (dismissing defendant's appeal because his 13 year fugitive status prevented the government from having sufficient appellate review); *United States v. Rosales*, 13 F.3d 1461, 1463 (11th Cir. 1994) (dismissing appeal based on the defendant's five year fugitive status).

321. *See* Daccarett-Ghia v. Commissioner, 70 F.3d 621, 627 (D.C. Cir. 1995).

322. *See Ortega-Rodriguez*, 507 U.S. at 246. The proposed expansion was to allow an appellate court to act even if there was no connection. The Court stated: "[s]uch a rule would sweep far too broadly, permitting, for instance, this Court to dismiss a petition solely because the petitioner absconded for a day during district court proceedings . . . ." *Id.*

323. *See Daccarett-Ghia*, 70 F.3d at 626.

324. *See Ortega-Rodriguez*, 507 U.S. at 246.

325. *See id.*; *see also* Katz v. United States, 920 F.2d 610, 612 (9th Cir. 1990) (stating that the doctrine did not apply because the individual was no longer a fugitive).

326. *See Daccarett-Ghia*, 70 F.3d at 627.

327. *See Ortega-Rodriguez*, 507 U.S. at 246.

mains a fugitive, there must be a connection in order to invoke the dismissal rule.[328]

2. The Majority's Failure to Apply the Ortega-Rodriguez Test

The first four lines of the *Parretti* en banc opinion are a direct quote of the *Ortega-Rodriguez* case. However, the majority selectively used the opinion to establish that the Supreme Court has continuously approved of the Fugitive Disentitlement Doctrine. As a result, the Ninth Circuit failed to determine whether there was "some connection" between Parretti's fugitive status and the ongoing appellate process. Instead, the court simply compared Parretti's fugitive status to four rationales of the doctrine and reasoned that this combination was enough to justify its use as reasonable.

a. The En Banc Opinion Effectively Disentitled the Government

The majority first stated that Parretti's fugitive status "disentitled him from calling upon the resources of the court to resolve his claims."[329] Despite using the rationale established in *Molinaro*, the court failed to justify the connection of Parretti's fugitive status to the appellate process. The purpose of the Fugitive Disentitlement Doctrine is to deny the benefits of the judicial system to those who flee a court's jurisdiction.[330] However, this justification is without merit here because Parretti could not be denied any further benefit from the en banc appeal.[331]

As described in Part II, Parretti received complete relief from the court's panel decision when he was released from his provisional arrest based upon a violation of the Fourth and Fifth Amendments.[332] Eight days later, Parretti faced a formal extradition hearing in which the evidentiary requirements were properly met.[333] Due to the potential impact of the panel opinion, the government sought relief from the Ninth Circuit by requesting it to reconsider its decision en banc.[334] However, the en banc opinion effectively denied the government, rather than Parretti, the benefits of appellate review. As a result, the important constitutional issues of a provisional arrest were left unresolved and the government was unable to dispel its concern.

328. *See id.*

329. Parretti v. United States, 143 F.3d 508, 511 (9th Cir. 1998) (en banc) (citing Molinaro v. New Jersey, 396 U.S. 365, 366 (1970)).

330. *See id.* at 512-13 (Reinhardt, J., dissenting).

331. *See id.* at 513.

332. *See supra* notes 262-264 and accompanying text.

333. *See Parretti*, 143 F.3d at 509-10.

334. *See id.*

Based upon the reasoning of the en banc opinion, the court attempted to create a connection between Parretti's fugitive status and the panel opinion. However, the focus of the court should have been on developing a connection between the government's appeal and Parretti's fugitive status. If conducted in this manner, the court, in its analysis, would have discovered that Parretti's fugitive status could not be penalized through disentitlement. Instead, the court's decision revealed no connection between the government's appeal and Parretti's failure to appear in Delaware for sentencing. This effectively disentitled the government from the benefits of the judicial process because it was unable to have its appeal properly reviewed by the appellate court. Rather, the Ninth Circuit jeopardized the appeal of the government in order to penalize Parretti for his actions in Delaware.

Dismissal of an appeal or a petition to appeal is based upon an equitable principle that a fugitive should be disentitled to the resources of a court to review his conviction.[335] More specifically, a court should not have to expend its resources to review an issue when one of the parties is illegally absent. As a result, this equitable principle of disentitlement becomes inapplicable when the fugitive has had his conviction overturned and it is the government seeking the appeal. In this situation, the government believes that equity should be in its favor because it presented the court with an issue that needed to be resolved for the sake of future proceedings. If the court simply ignores that issue and dismisses the case, then the government is faced with uncertainty. Thus, the court should have reached and decided the merits of the case, especially considering the constitutional issues involved.[336]

b. The Enforceability of the Court's Judgment

The court's next justification was an attempt to draw a connection between Parretti's fugitive status and the inability of the appellate court to enforce its judgment. Since the decision of *Smith v. United States* the judiciary has justified its use of the Fugitive Disentitlement Doctrine when it has been unable to secure the presence of the petitioner in order to enforce its judgment.[337] Without this protection, the

335. *See* United States v. Campos-Serrano, 404 U.S. 293, 294-95 (1971); *see also* Molinaro v. New Jersey, 396 U.S. 365, 366 (1970).

336. *See* Florida v. Rodriguez, 469 U.S. 1 (1984) (deciding the merits of the case because of the constitutional issues).

337. *See supra* notes 81-87 and accompanying text. "Every application of the Smith rule necessarily assumes that an appeal may be meritorious. . . . [F]or the purpose of deciding whether the Smith rule applies, I believe the merits of the appeal should be entirely disregarded." United States v. Sharpe, 470 U.S. 675, 724 (1985) (Stevens, J., dissenting).

judiciary and its supporters fear that a defendant could take full advantage of the judicial process and either wait for a favorable outcome or avoid an adverse decision by fleeing the court's jurisdiction.[338] Consequently, a court's ability to maintain a meaningful judicial process would become diluted as individuals avoided unfavorable decisions. According to the Ninth Circuit, it was unable to guarantee the enforceability of any judgment it rendered against Parretti due to the fact that he remained a fugitive.[339]

At the time of the en banc decision, Parretti was a fugitive of the United States. Thus, it would have been nearly impossible for the Ninth Circuit to obtain his presence for the district court while he remained in Italy. However, the court's ability to adjudicate the government's appeal was not directly related to the enforceability of a decision against Parretti. When the Ninth Circuit issued its panel opinion, it simply resolved the issues of Parretti's detention during his provisional arrest. As stated before, once Parretti's appeal was resolved he was then subjected to a formal extradition hearing where the government was able to meet the required evidentiary standards for an extradition, thereby rendering the enforceability of the judgment insignificant to the resolution of the government's appeal.

The government's appeal was concerned with the precedent that the panel opinion had established for a provisional arrest.[340] Due to the inherent briefness of a provisional arrest, it is possible for the issue to become moot[341] before the judicial process can be completed.[342] However, Parretti's situation avoided this problem because it contained a constitutional question that is "capable of repetition" but continuously evades review.[343] As a result, the Ninth Circuit should have addressed the constitutional issues challenged by the government of the United States regardless of enforceability. It has been stated that when a party "seeks to vindicate a right vouchsafed by the United States Constitution, the court should give weight to this factor

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338. *See supra* notes 88-104 and accompanying text.

339. *See* Parretti v. United States, 143 F.3d 508, 510 (9th Cir. 1998) (citing *Ortega-Rodriguez*, 507 U.S. at 239-40).

340. *See id.* at 513.

341. For example:

> A case is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. . . . Question is "moot" when it presents no actual controversy or where the issues have ceased to exist.

BLACK'S LAW DICTIONARY 1008 (6th ed. 1990).

342. *See Parretti*, 143 F.3d at 513.

343. *See* Honig v. Doe, 484 U.S. 305, 318-23 (1988) (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982)).

in determining how to exercise its discretion."[344] As the dissent in *Parretti* noted, there is a reasonable possibility that in the future Parretti could be subject to the same provisional arrest.[345] Consequently, the importance of resolving the constitutional standards of a provisional arrest outweighs the court's present ability to enforce its decision against Parretti.

c. Dismissal Protects the Dignity of the Appellate Process

The court's third justification for using the Fugitive Disentitlement Doctrine was that dismissal served as "an important deterrent function" for those who fled its jurisdiction.[346] It also stated that dismissal promoted an "interest in efficient, dignified appellate practice" of the court.[347] Although dismissal may serve as a deterrent for those who flee a court's jurisdiction, it must be pointed out that Parretti fled the jurisdiction of a Delaware state court, not the Ninth Circuit. Some have stated that dismissal should be used to protect all parts of the federal judiciary regardless of the original jurisdiction that was fled.[348] According to the court in *Broadway v. City of Montgomery*,[349] it is immaterial whether an individual fled the jurisdiction of a different sovereign.[350] This is based on the belief that if an individual flees one jurisdiction he or she has flouted the authority of all parts of the judiciary.[351] Thus, to deter escape, a court should dismiss an appeal regardless of whether an individual has fled its jurisdiction or the jurisdiction of an unrelated court. As a result, the Fugitive Disentitlement Doctrine would limit an individual's access to all courts in the United States if he or she has fled the jurisdiction of some court within the United States.[352]

However, the Supreme Court in *Ortega-Rodriguez* expressly denied the Eleventh Circuit the power to protect the dignity of one of its

344. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984).

345. *See Parretti*, 143 F.3d at 513 n.2. The dissent further acknowledged that Parretti was an international businessman who had many interests within the United States. *See id.* Thus, it is possible that he could be subject to the same type of provisional arrest when and if he returns to this country. *See id.* As a result, the decision reached by the Ninth Circuit could still be enforced against him. *See id.*

346. *Id.* at 511 (quoting *Ortega-Rodreguez*, 507 U.S. at 242).

347. *Id.*

348. *See, e.g.*, Daccarett-Ghia v. Commissioner, 70 F.3d 621, 628 (D.C. Cir. 1995) (noting that the government argued that when "an individual appeals his criminal conviction while he remains a fugitive, there is a connection between his fugitive status and the appellate proceedings, which is all that *Ortega-Rodriguez* requires").

349. 530 F.2d 657 (5th Cir. 1976).

350. *See id.* at 659.

351. *See Daccarett-Ghia*, 70 F.3d at 624.

352. *See* Prevot v. Prevot, 59 F.3d 556, 562 (6th Cir. 1995).

district courts through dismissal.[353] The Court refused to expand the Fugitive Disentitlement Doctrine to allow an appellate court "to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system . . . ."[354] According to the Court, the district court was fully capable of defending itself and deterring flight from its jurisdiction.[355] Likewise, the state court of Delaware was fully capable of defending its own dignity through a variety of sanctions, including the extradition of Parretti from Italy. It was not the duty of the Ninth Circuit to abandon the government's appeal in order to protect a different court system. This does not mean that a court could never dismiss the appeal of an individual who was a fugitive of another jurisdiction. As long as a sufficient connection exists between the fugitive status and the present appellate process, dismissal can be used. However, the Ninth Circuit failed to acknowledge that a sufficient nexus was necessary.

d. The Adversarial Character of the Appellate Process

Finally, the Ninth Circuit applied the Fugitive Disentitlement Doctrine because the adversarial character of criminal litigation would be threatened by a party's fugitive status.[356] The court relied upon Justice Stevens' dissent in *United States v. Sharpe*,[357] which explained that an attorney would be less inclined to represent his client if he or she was a fugitive from justice.[358] Justice Stevens assumed that an attorney would usually lose all contact with his client after an escape.[359] Furthermore, he believed that an attorney would lack any interest or motivation to defend a client in a future proceeding when the client has violated the trust of the attorney-client relationship by becoming a fugitive.[360] As suggested by the reasoning of Justice Stevens, the Ninth Circuit refused to decide the merits of the case because of the possibility that the adversarial process would not operate effectively.[361]

However, in *Sharpe*, a majority of the Supreme Court, which included six justices, remained skeptical about the threat a fugitive

353. *See* Ortega-Rodriguez v. United States, 507 U.S. 234, 246 (1993).

354. *Id.*

355. *See id.* at 247.

356. *See supra* notes 283-285 and accompanying text.

357. 470 U.S. 675 (1985).

358. *See id.* at 723-24 (Stevens, J., dissenting).

359. *See id.*

360. *See id.*

361. *See supra* notes 271-285 and accompanying text.

might have on the adversarial process.[362] The Court emphasized that Justice Stevens relied upon precedent that resolved situations in which the fugitive requested an appeal.[363] Rather than dismissing the merits of the case because the defendants had recently become fugitives, the Court instructed their attorneys to submit briefs in support of their position as amicus curiae.[364] As a result, the Court was able to decide the merits of the case involved.

In *Parretti*, it was the government and not Parretti that sought review of the panel opinion. Also, as the dissent mentioned, Parretti's counsel did agree to continue his representation despite Paretti's flight to Italy.[365] In light of the procedural history of the case, it seems as though Parretti's counsel had been a worthy and capable adversary for the government. Therefore, the government would not be prejudiced as a litigant and the adversarial process would be maintained as long as Parretti's counsel adequately served his client.[366] In fact, one could argue that Parretti's attorney was now the attorney for all of those who will face a provisional arrest warrant in the future. As the dissent noted, "[t]he fugitive disentitlement doctrine makes sense *only* when we deny the *fugitive* some form of relief from the court, not when we frustrate our own ability to resolve critical constitutional questions."[367]

B. Policy Reasons Required a Review of the Constitutional Issues Resolved in the Panel Opinion

The courts have never directly encountered the Fourth Amendment requirement of probable cause pursuant to a provisional arrest warrant. Most courts have avoided the question by interpreting the language of the corresponding extradition treaty as requiring probable cause.[368] However, the Ninth Circuit, in its panel opinion, was able to

362. *See* 470 U.S. at 681 n.2.

363. *See id.* The Court further stated:

> JUSTICE STEVENS would have this Court adopt a rule that, whenever a respondent or appellee before the Court becomes a fugitive before we render a decision, we must vacate the judgment under review and remand with directions to dismiss the appeal. This theory is not supported by our precedents . . . .

Id.

364. *See id.*

365. *See* Parretti v. United States, 143 F.3d 508, 513 n.3 (9th Cir. 1998) (en banc) (Reinhardt, J., dissenting).

366. *See id.* at 512-13.

367. *Id.* at 513.

368. *See, e.g.*, Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988) (interpreting Article XI of the extradition treaty between the United States and Spain as requiring a showing of probable cause in order to obtain an arrest warrant); Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986) (assuming, without deciding, that the treaty between the United States and the Republic of Co-

break away from this restrictive mold and require a showing of probable cause for a provisional arrest through the Fourth Amendment.[369] The panel opinion also rejected a presumption against bail during a provisional arrest when no evidence was established to show that the individual was a threat to the community or a risk of flight.[370]

The government requested the Ninth Circuit to review its panel opinion en banc because it was concerned with the potential ramifications of that decision on foreign extradition.[371] More specifically, the government believed that the panel opinion would restrict its ability to conduct its foreign affairs in an efficient and reliable manner.[372] By requiring a strong showing of probable cause in order to obtain a warrant for a provisional arrest, the government believed that the Ninth Circuit established new obstacles for the United States to overcome.[373]

According to the government, foreign extradition treaties were created with the option of a provisional arrest in order to detain an individual temporarily while the requesting country developed its evidence for a formal extradition.[374] The government claimed that the provisional arrest would lose all meaning in foreign extradition if probable cause were required for a provisional arrest warrant. It explained that an enormous amount of time would be required for a country to manufacture, translate, and send information to a magistrate in order to satisfy a threshold requirement of probable cause.[375] When the requesting state spends time on establishing probable cause for the provisional arrest warrant it offers the defendant an opportunity to take evasive action and travel worldwide.[376] As a result, the government would be unable to fulfill its obligations under the respec-

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lumbia required a showing of probable cause to support a provisional arrest before an extradition hearing); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) (stating that Article XII of the extradition treaty between the United States and Italy "so clearly demands a showing of probable cause before any warrant for provisional arrest may issue, that we need not address the constitutional question").

369. *See* Parretti v. United States, 122 F.3d 758, 774-76 (9th Cir. 1997); *see also supra* notes 227-230, 263 and accompanying text.

370. *See Parretti*, 122 F.3d at 780-81; *see also supra* note 264 and accompanying text.

371. *See* Lis Wiehl, *Extradition Law at the Crossroads: The Trend Toward Extending Greater Constitutional Procedural Protections to Fugitives Fighting Extradition From the United States*, 19 MICH. J. INT'L L. 729, 782-83 (1998) [hereinafter Wiehl, *Extradition Law*].

372. *See id.* at 783.

373. *See id.* at 784.

374. *See id.*

375. *See id.*

376. *See id.* at 782-86.

tive extradition treaty. Consequently, the foreign relations between the United States and its treaty partners would become strained.[377]

The government also argued that a presumption against bail was required to aid its success in carrying out its treaty obligations.[378] Without the ability to detain an individual without bail there was a risk that the individual would flee before the formal extradition hearing could take place. Despite this justification, the length of a provisional arrest seems too long in light of today's advanced communications between governments.[379] If a provisional arrest were subject to the constitutional requirement of probable cause, the length of detention would not be an issue.

The Ninth Circuit's application of the Fugitive Disentitlement Doctrine has created a heavier burden for the government in future extradition hearings. By dismissing its panel opinion the court has left two constitutional questions unresolved. First, does the Fourth Amendment require a showing of probable cause for a provisional arrest warrant? Second, is it a violation of the Fifth Amendment Due Process Clause to detain an individual who is not a flight risk? The only benefit obtained from the application of the doctrine was the punishment of the defendant, Giancarlo Parretti.[380] However, this was a minimal benefit at best because Parretti had received all the possible relief that he could have obtained from the panel opinion.[381] Furthermore, the only way in which Parretti could be punished would be if he were to affirmatively return to the United States and invoke the protection of the Ninth Circuit.[382]

Despite its minor effect, the Ninth Circuit utilized its en banc opinion to deliver a message to others that have contemplated evading the judiciary and becoming fugitives. The end result is that the court frustrated its own ability to resolve significant issues of foreign extradition simply to prove a point for another court's jurisdiction. More importantly, it has left the government, whose appeal was ultimately dis-

377. *See* Wiehl, *Extradition Law*, *supra* note 371, at 783 (stating that a troubling aspect of the panel opinion was its lack of deference to the Executive branch of government and its ability to conduct foreign affairs).

378. *See* Parretti v. United States, 122 F.3d 758, 778-80 (9th Cir. 1997).

379. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 681-84. Bassiouni also stated that: "In 'provisional arrest' situations, the usual absence of evidence of 'probable cause' presented by the requesting government leaves the relator with precious little to argue for in support of his release on bail. And that makes the period of up to sixty days appear excessive." *Id.* at 682.

380. *See* Parretti v. United States, 143 F.3d 508, 512-13 (9th Cir. 1998) (en banc) (Reinhardt, J., dissenting).

381. *See id.* at 511-13.

382. *See id.*

missed, to wander aimlessly in the extradition process without any guidance.[383] Thus, the government has been rendered unable to determine the requirements for future provisional arrest proceedings. Without a clear ruling from the court the government will continue to obtain the provisional arrest warrant without a showing of probable cause. As a result, in the future an individual that the government seeks to detain will be released because the government has no guidance concerning the requirement for a proper provisional arrest warrant.

C. *A Proper Proceeding*

The judiciary has never before in a foreign extradition case had the opportunity to analyze a provisional arrest warrant within the framework of the United States Constitution. This is because some courts have interpreted 18 U.S.C. § 3184 to require probable cause for a provisional arrest warrant.[384] However, this rationale is flawed because § 3184 only requires probable cause for a formal extradition hearing and does not apply to provisional arrest warrants.

Other courts have interpreted the language "such, further information, if any" of foreign extradition treaties to require probable cause for a provisional arrest. These decisions not only increased judicial scrutiny but also enhanced judicial awareness that probable cause was required for a provisional arrest warrant in some form. They also solidified that § 3184 only requires probable cause for a formal extradition hearing. In response to the judicial interpretation of treaty language, the government began to eliminate the above language from any foreign extradition treaty which contained it. As a result, the requirement of probable cause for a provisional arrest warrant was eliminated.

In *Parretti*, the Ninth Circuit was forced to rely upon the Constitution in order to resolve whether there must be a showing of probable cause for a provisional arrest warrant.[385] Through its application of

383. According to the dissent, "[i]n light of these procedural and factual circumstances, it is clear that the fugitive disentitlement doctrine has no applicability. Indeed, neither party has urged the court to invoke the doctrine and both parties agree that the doctrine has no relevance to the case." *Id.* at 512.

384. *See* BASSIOUNI, INTERNATIONAL EXTRADITION, *supra* note 14, at 685-88.

385. *See* 122 F.3d 758, 769-70 (9th Cir. 1997). Unlike the treaty in *Caltagirone v. Grant*, the extradition treaty between France and the United States did not contain any language that could be construed to require probable cause for a provisional arrest. Also, the Ninth Circuit could only require a showing of probable cause under § 3184 for a formal extradition hearing. As a result, the Ninth Circuit had no other alternative but to examine probable cause for a provisional arrest under the Fourth Amendment of the United States Constitution.

the Fourth Amendment, it was able to require a showing of probable cause before a provisional arrest warrant could be issued.[386] The Ninth Circuit also held that it was a violation of the Due Process Clause of the Fifth Amendment to detain an individual who was neither a flight risk nor a threat to the community.[387] The Ninth Circuit en banc then failed to practice discretion and vacated the panel's two landmark rulings in order to prove a point to an individual.[388]

Furthermore, the Ninth Circuit en banc should have practiced restraint in applying the Fugitive Disentitlement Doctrine. Realizing that the panel opinion had established two watershed rulings in the law of extradition, the government deserved judicial review concerning the constitutional issues.[389] The Fugitive Disentitlement Doctrine should not have applied because there was no connection between Parretti's fugitive status and the appellate process.[390] In response to the government's appeal of the panel's decision, both attorneys submitted briefs on behalf of their clients.[391] Any decision that the Ninth Circuit would have then rendered could have been enforced during future provisional arrests, even Parretti's.[392] Therefore, by not using the Fugitive Disentitlement Doctrine the Ninth Circuit could have provided an effective review of the government's appeal.[393]

The panel opinion needed only minor modifications, which could have been provided by the Ninth Circuit en banc. A compromise between the government's position and the panel opinion concerning the requirement of probable cause could have been reached. The government feared that by requiring a showing of probable cause for a provisional arrest two problems would arise. First, the formal extradition hearing would become a worthless proceeding if all the evidence were presented to obtain a provisional arrest warrant. Second, foreign relations between the United States and its treaty partners would falter if the government were unable to reliably apprehend an individual due to the requirement of probable cause.

A solution would be to continue to require a showing of probable cause for a provisional arrest warrant. However, the scope of the

386. *See id.* at 770-76.

387. *See id.* at 776-81.

388. *See* Parretti v. United States, 143 F.3d 508, 510-11 (9th Cir. 1998) (en banc).

389. *See id.*

390. *See id.* at 512-13 (Reinhardt, J., dissenting).

391. *See id.* at 511-13.

392. *See id.* at 512.

393. The dissent in the en banc opinion makes a strong point that neither party argued or requested the majority to use the Fugitive Disentitlement Doctrine. *See id.* at 511-13. Both sides wanted the issue resolved.

probable cause requirement should be more than a simple facsimile request of a foreign nation but less than what is required for a formal extradition hearing. The sole objective should be to provide individuals like Parretti with facts and information that they can use to effectively challenge their detainment.[394] Furthermore, the court should continue to question the viability of *Wright v. Henkel*[395] after nearly a century of time. Although it has never been expressly overruled it seems as if the doctrine has never supplied the courts with adequate guidance.[396] Since the time of its creation the special circumstances doctrine has provided lower courts with confusion because they are unable to determine what exactly constitutes a special circumstance for bail.[397] No clear guidelines have been established as to what constitutes a special circumstance because the lower courts continue to disagree over similar fact patterns.[398] Therefore, the judiciary should focus more upon the defendant's probability of flight and his or her danger to the community rather than the arcane special circumstances doctrine for the determination of bail.

IV. IMPACT

After the panel issued its opinion, many within the government believed that there would be major changes in how the United States practiced international extradition.[399] In fact, it was believed that the case "could force the Government to renegotiate most of its international extradition treaties and abandon its century-old practices for arresting and detaining fugitives found in the United States."[400] Many experts also predicted that the opinion would eventually land in the hands of the Supreme Court to resolve the constitutional issues.[401] However, due to the Ninth Circuit's application of the Fugitive Disentitlement Doctrine, the watershed holding of the panel opinion was vacated. On October 5, 1998, the Supreme Court denied the petition for writ of certiorari.[402]

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394. This could be as effective as a probable cause hearing that is required by *County of Riverside v. McLaughlin*. *See* 500 U.S. 44 (1991) (holding that a prompt hearing depends upon a number of factors including judicial resources, holidays, and the amount of crime).

395. 190 U.S. 40 (1903).

396. *See supra* notes 191-226 and accompanying text.

397. *See supra* notes 191-226 and accompanying text.

398. *See supra* notes 191-226 and accompanying text.

399. *See* Lis Wiehl, *Court Case Challenges U.S. Practices In Extradition*, N.Y. TIMES, Dec. 22, 1997, at A23.

400. *Id.*

401. *See id.*

402. *See* Parretti v. United States, 525 U.S. 877 (1998).

Consequently, the en banc decision has left lawyers for both the government and defendants in a state of uncertainty. Neither party truly understands the requirements to obtain a valid provisional arrest warrant in a case of foreign extradition. Therefore, the government continues to detain individuals through a provisional arrest when requested by another country. Furthermore, the government continues to offer facsimile from foreign governments and affidavits of the AUSA to satisfy any requirements of probable cause that a magistrate may require.

The government justifies its lack of information to support a provisional arrest warrant based on the belief that it needs to apprehend individuals immediately. According to the government, if it is required to wait for a foreign country to gather, translate, and transfer information, it will be unable to satisfy its obligations under foreign extradition treaties.[403] However, the government's justification for the lack of probable cause has lost some of its support due to the technological advances of today's society. According to journalist Peter Truell, "[b]ecause of technological advances in international police work—chiefly the explosive growth in computer data bases and the lighting-fast transmission of photos" it has become more difficult for a fugitive to hide from authorities.[404] Therefore, the burden of probable cause really should not affect the efficiency of the government's apprehension of individuals.

Rather than review the decision of the panel opinion, the Ninth Circuit chose to apply the Fugitive Disentitlement Doctrine and vacate its opinion. The court lost a chance to establish a landmark decision worthy of the Supreme Court's review. Instead, the case has lost its impact on the law of extradition and has now become another opinion for the authority of the judiciary to dismiss an appeal based on an individual's fugitive status. In fact, the first case to cite the en banc opinion was *United States v. King*,[405] in which the court applied the Fugitive Disentitlement Doctrine to dismiss a fugitive's appeal.[406]

The provisional arrest can be a very dangerous tool when used by the government. It offers the government the ability to detain an individual for months while it gathers enough evidence to succeed at a

403. *See* Wiehl, *Extradition Law*, *supra* note 371, at 780-84.

404. Peter Truell, *Fugitive Financiers Find Fewer Havens After The Initial Flight, They Can Hide But Can't Run Again So Easily, Police Say*, GLOBE & MAIL, Jan. 17, 1997, at B6. Truell further states: "The authorities say that no fugitive is ever really safe in an age when the next-door neighbour or the kid down the block can be the kind of vigilant citizen who regularly checks out the U.S. Justice Department's wanted list on the World Wide Web." *Id.*

405. 162 F.3d 1170 (9th Cir. 1998) (unpublished table decision).

406. *See id.*

formal extradition hearing. The panel opinion countered the government's power and leveled the playing field for individuals like Parretti, and forced the government to provide enough information to issue a warrant. The panel opinion protected foreigners and United States citizens alike from unjust detention. It offered individuals of foreign extradition the ability to be free from seizure without a showing of probable cause—a right similar to that enjoyed in the United States. The en banc opinion destroyed this protection and has returned the provisional arrest to the government as a dangerous tool of detention.

V. CONCLUSION

The world has existed without complete anarchy because of the ability of each society to maintain social order to some degree. Since the early times of Rome and Egypt, extradition law has provided governments with the power to accomplish social order. As society has continued to develop it has become easier for individuals to escape prosecution of crimes committed in their homeland. However, governments have also been able to create treaties with each other and develop technology in order to limit the ability of criminals to escape justice. Consequently, rules are required to prevent governments from possessing too much power and infringing upon individual rights. The decision of *Parretti v. United States* is a perfect example of a wasted opportunity for the Ninth Circuit to offer order to an area of law that has been in disarray. Its effect has been to leave both the government and defendants in a state of confusion concerning the requirements for a provisional arrest. Its impact will range from foreign businessmen such as Giancarlo Parretti to regular United States citizens like Robert Henry Russell.

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